Supreme Court, U.S.
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Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

ANDRE KIMBOKO

Petitioner

v.

UNITED STATES, et al.

Respondents

Petition For Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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1+6 pp

QUESTIONS PRESENTED FOR REVIEW

This Court established the "collateral order doctrine" to address questions of rights which would be irretrievably lost if not reviewed immediately. Civil Rights Act of 1964, as amended, guarantees equal rights under law, full and equal benefit of all laws and proceedings for the security of persons and property. Petitioner's rights have been breached: rights to (a) respond to presiding judge's quotes of derogatory remarks about Petitioner, from unauthenticated declarations whose admissibility is in controversy, and (b) reply to opposing party briefs. Petitioner's pleadings to present evidence and other requests were disregarded; related Respondents' pleadings were granted. These are substantial equal rights; thus, orders denying or omitting them are appealable under the "collateral order doctrine".

PARTIES TO THE PROCEEDINGS

United States of America, on Behalf of its agencies, agency heads and officials, and other United States of America Government officials. At the time this action was filed, the Federal executive branch agencies and their officers, and Federal government officials of the executive branch of the United States of America Government, referenced below, are or were employed by the government of the United States of America, located in or about Washington, District of Columbia (D. C.), specifically: Michael R. Nelson, Special Assistant to the President of the United States of America, Office of Science and Technology Policy, and Bill Mason, Director of Correspondence for the Vice President, via Al Gore, Vice President of the United States of America, The White House; Secretary Federico Pena, Federal Department of Transportation (DOT), and Rich Lieber, Procurement Operation Division, via Secretary Federico Pena, Federal Department of Transportation (DOT); Acting Secretary Michael Kantor, Federal Department of Commerce (DOC), and Assistant Secretary for Communications and Information, and Administrator, Larry Irving, NTIA, via Acting Secretary Michael Kantor, Federal Department of Commerce (DOC); Secretary Donna Shalala, Federal Department of Health and Human Services (HHS), and Marc R. Weisman, Director, Division of Acquisition Policy and Oversight, via Donna Shalala, Federal Department of Health and Human Services (HHS); Secretary Jesse Brown, Federal Department of Veterans Affairs (VA), and Marilyn Martin, Acting

PARTIES TO THE PROCEEDINGS (Cont.)

director, Acquisition Operations Service, via Secretary Jesse Brown, Federal Department of Veterans Affairs (VA).

NOTE: For some reason, the name of SHIRLEY S. CHARTER, Secretary, Federal Department of Health and Human Services (HHS) was added as a party to these proceedings by the United States Court of Appeals, Tenth Circuit. See Appeals Court orders of July 30, 1997 and December 8, 1997. It is not clear what these judges read !

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ORDERS AND OPINIONS BELOW

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MINUTE ORDER (September 25, 1996) entered by Chief Judge Alan B. Johnson, dated September 25, 1996 granting leave to file reply brief to the Respondents' motion to dismiss; appears in the appendix starting at page A - 14.

APRIL 9, 1997 Order Granting Plaintiff's Motion to Cure Jurisdictional Grounds as They Relate to the Relief and Claims to be Sought under the United States Court of Claims; and Granting Plaintiff's Second Motion to Request a Leave of Court to Amend Plaintiff's Pleading and Request Transfer of Certain Portions of the Claims for Relief to the United States Court of Federal Claims; and Ordering Transfer or Dismissal; appears in the appendix starting at page A - 16.

OCTOBER 6, 1997 Order Directing Transfer of Case to Court of Claims; appears in the appendix starting at page A - 20.

APRIL 9, 1997 Order Denying Plaintiff's First Motion for Leave to File Amended Complaint; appears in the appendix starting at page A - 22.

BASIS FOR JURISDICTION IN THIS COURT

In its order dated July 30, 1997, the United States Court of Appeals for the Tenth Circuit dismissed Appellant's appeal for lack of jurisdiction, the district court's orders did not constitute "final order".

Its order, filed December 8, 1997, the United States Court of Appeals for the Tenth Circuit denied the Appellant's motion to reinstate [rehearing] the appeal since "the order transferring the matter to the Court of Claims is not appealable".

The letter, dated December 24, 1997, the United States Court of Appeals for the Tenth Circuit returned the Petitioner's Petition for Reconsideration without action; this Appeals court has translated the motion for reinstatement of the appeal as motion for rehearing.

Nevertheless, the Order dated and filed on December 8, 1997 is assumed by the Petitioner as the starting day for the 90 days time limit, as avoid any misapprehension and misconstrue about the jurisdiction of this Court. By Rule 13.3 of this Court, the date of December 8, 1997 Order is the date, as modified by this Court's letter of April 23, 1998.

Petitioner believes that the 28 U.S.C. § 1254 statutory provision confers on this Court jurisdiction to review this case, in that, cases in the courts of appeals may be reviewed by the Supreme Court by the following method: by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or degree.

The appeal of this case to the United States Court of Appeals for the Tenth Circuit is the result of district court orders denying the Petitioner the rights to: (a) respond to presiding judge's quotes of derogatory remarks about Petitioner, from unauthenticated declarations whose admissibility is in controversy, (b) reply to opposing party briefs, (c) give evidence, and (d) the full and equal benefit of all laws; that is, the same rights that are enjoyed by white citizens of this country; noting that similar Respondents' pleadings were granted.

CERTIFICATION OF MAILING

True and corrected copies of the foregoing Petitioner's "On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit" were delivered and addressed to the following by depositing the same in the United States of America Postal Service, postage prepaid:

A. - Solicitor General of the United States of America; Room 5614; Department

of Justice 10th Street & Constitution Ave., N.W.; Washington, DC 20530; three (3) copies

B. - One (1) copy to each of the following:

Jane Converse, Esq. Office of General Counsel Professional Staff Group V (025) VA; 810 Vermont Avenue, NW; Washington, DC 20420

Catherine Shea, Esq. Contract Law Division, Office of General Counsel Commerce Department; 14th Street: Constitution Avenue and E Street, NW Washington, DC 20230

Thomas F. Mahoney, Esq. Senior Attorney Office of the Assistant General Counsel for Litigation; DOT; 400 Seventh Street, SW; Washington, DC 20590

Jonathan A. Baker, Esq. Office of General Counsel HHS; Room 5362, Cohen Bldg. 330 Independence Avenue, SW, Washington, DC 20201

James M. Kinsella, Esq. Elizabeth Rinaldo, Esq. Department of Justice Commercial Litigation, Civil Division 1100 L. Street, N.W.; Washington, DC 20530

Komiki Gibson, Esq. Office of the Vice President; Room 266 Old Executive Office Building; The WHITE HOUSE; Washington, DC 20501

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS, FEDERAL RULES OF CIVIL PRACTICE AND FEDERAL RULES OF EVIDENCE

A. Statutory Provisions

* Civil Rights Act of 1964, as amended, Equal Rights under the Law: 42 U.S.C. § 1981(a) [and NOT 1981a]; 42 U.S.C. § 1981a

* 28 U.S.C. § 1346(b)

* 41 U.S.C. § 401

* Statutory Provision to Confer on this Court Jurisdiction to Review this Petition - 28 U.S.C. § 1254

B. Regulations Federal Acquisition Rules ("FAR")

* FAR § 15.504

* FAR § 15.506-1(c)

* FAR § 1.102

* FAR § 1.102-2

C. Federal Rules of Evidence

* Rule 106

* Rule 901

STATEMENT OF THE CASE

COMES NOW the Petitioner, by and through undersigned André Kimboko, Pro Se, African American and citizen of the United States, currently residing in the state of Colorado, moves to file a petition for a writ of certiorari to review orders by the United States Court of Appeals for the Tenth Circuit issued and entered on July 30, 1997 and December 8, 1997. In support whereof, the Petitioner states and avers as follows:

A. Facts Material to the Consideration of the Questions

On June 4, 1996, the Petitioner filed a complaint alleging failure by the United States government employees and officials to comply with the sub subparagraph of the FAR § 15.506-1(c) provision. On September 3, 1996 or thereafter, Petitioner filed a motion for a summary judgment. In response, Respondents filed their original opposing brief on September 23, 1996 as per district court Minute Order. See A - 8 and A - 31 for district court Minute Order of September 4, 1996 and FAR § 15.506-1(c) regulation, respectively.

In their original opposing brief Respondents stated in part:

> "The substance of a claim, not its characterization by plaintiff, controls whether the claim is within 28 U. S. C. § 1346(a)(2) or 28 U. S. C. § 1346(b) and, therefore, whether exclusive subject matter jurisdiction lies in the

Court of Claims."

See p. 5, paragr. 3, the United States Motion to Dismiss.

This confirmed the jurisdictional argument advanced in their ANSWER, where they stated:

> "The jurisdictional statute cited by plaintiff, 28 U.S.C. § 1343, does not confer subject matter jurisdiction on this Court for this action. That jurisdictional statute confers jurisdiction on United States District Courts only in cases seeking recovery under one of the substantive civil rights tatutes or the Equal Protection Clauses of the Fourteen Amendment. *Nouse v. Nouse,* 450 F.Supp. 97 (D.Md. 1978), ...".

See p. 8, paragr. 2 in the Respondents' ANSWER.

The effect of these citations was to shift the jurisdiction basis of this action from the 28 U. S. C. § 1346(b) provision to the application of Tucker Act, 28 U. S. C. § 1346(a)(2). Thus, jurisdictional deficiency was designed, created, and fabricated. This imaginary jurisdictional deficiency will be affirmed by the presiding judge, the Honorable CHIEF district court judge, Alan B. Johnson.

Petitioner was a duly certified 8(a) Program participant at the time the unsolicited proposal was submitted, a fact conveyed to the United States government

officials and employees in the proposal's Abstract. See A - 73, paragr. 1, Proposal's Abstract.

The 8(a) certification was granted in 1985 by the SBA on racial membership basis/criteria; Petitioner is an African American and citizen of the United States. The 8(a) Program has been ruled by this Court and other courts as a race-conscious program. See Adarand Constructors, Inc. v. Pena, Larson MacDonald or Adarand Constructors, Inc. v. The United States, 16 F.3d 1537; 1994 U.S.

Hence, on September 25, 1996 or thereafter, Petitioner requested leave to reply to Respondents' original opposing brief, in accordance with the local rule, D.C.COLO.L.R. 7.1(F). See A - 34. Leave of court to reply specifically stated the reason and purpose of the request as to clarify the jurisdictional issue:

> "... More significantly, Defendants' arguments regarding the jurisdiction of this Court over this action, including the definition of the Petitioner's claims, are erroneous and incompetent."

See A - 43, paragr. 3, for the motion for leave to Reply.

Leave was granted with the instruction to submit the Reply brief by October 11, 1996. See A - 12 for the district court Minute Order, dated September 23, 1996 granting the leave to reply. Petitioner's Reply NEVER was considered by the presiding judge, the Honorable CHIEF district court judge, Alan B. Johnson.

Within 4 (four) days of finding out that the Petitioner's leave to reply was granted, Respondents filed their Amended version of the same motion on September 27, 1996. Again, Respondents stated:

> "The substance of a claim, not its characterization by plaintiff, controls whether the claim is within 28 U. S. C. § 1346(a)(2) or 28 U. S. C. § 1346(b) and, therefore, whether exclusive subject matter jurisdiction lies in the Court of Claims." See page 6, paragraph 3, Respondents' Amended Motion to Dismiss.

Respondents provided the district court with a litany of citations, including GAO's "rulings" as precedents, which were meant to totally invalidate Petitioner's claims for recovery under substantive civil rights statutes of the Civil Rights Act of 1964, as amended, 42 U.S.C. § § 1981, 1983 and 1988, pursuant to 28 U. S. C. § 1346(b).

Respondents also submitted their "Initial Rule 26 Disclosure" along with both of their opposing briefs. Their Initial Rule 26 Disclosure included declaration by Messrs. Michael R. Nelson, Special Assistant to the President of the United States of America, Office of Science and Technology Policy, The White House, and Richard A. Lieber, Chief, Procurement Operation Division, Federal Department of Transportation (DOT), and others.

The content and substance of the Initial Rule 26 Disclosure were to show and indicate that Respondents have complied with

the second sub subparagraph of the FAR § 15.506-1(c) provision, and responded within 30 to 60 days. However, letters by Messrs Nelson [handwritten] and Lieber show that their responses were late by 460 to 895 days which is well in excess of 40 to 60 days allowed by the second sub subparagraph FAR § 15.506-1(c) to respond. See A - 35, and A - 40 through A - 41 for Messrs Nelson and Lieber's letters, respectively. This is a clear violation of the FAR § 15.506-1(c) regulation [see A - 32, second sentence]; it is also a violation of the 28 U.S.C. § § 1731 and 1746 provisions, a perjury, as noted at A - 90, paragraph 10.

On October 11, 1996, Petitioner filed his Reply brief, and the Motion to Amend and Proposed Amended Complaint. Reply, Attachments A and B contained affidavits and correspondence documents with the Respondents, including handwritten letter by Mr. Michael R. Nelson, and letter by Mr. Richard A. Lieber, and response to GAO's decisions so extensively cited by the Respondents as precedents. See A - 44 through A - 71, and A - 82 through A - 84, for the Reply, and Leave to Amend Complaint, respectively.

In addition to the Reply brief, Petitioner also responded to the Respondents' AMENDED pleading, with the request that it be reviewed along with the Reply. See A - 90, paragraph 10, and A - 91 [in the prayer (b)].

On October 16, 1996, a hearing was held. Over 99.00% of the hearing was devoted to the discussion of the Respondents' motion

to dismiss. There were interruptions created by Honorable CHIEF district court judge Alan B. Johnson's:

(1) quotes of derogatory remarks about the Petitioner from Respondents' Initial Rule 26 Disclosure;

(2) derogatory comments, specifically denigratory, defamatory and slanderous remarks, about this action; and

(3) derogatory comments about the amended complaint.

The contents of the Reply and Reply, Attachments A and B were NEVER reviewed or discussed at all, the amended pleadings by both the Petitioner and the Respondents were NEVER discussed either.

Respondents' Initial Rule 26 Disclosure were NEVER authenticated. Petitioner's REPLY was available to the presiding judge since October 11, 1996. The Reply contains letters by Messrs Nelson and Lieber, and other evidentiary documents which indicate the nature of misrepresentation of these declarations. Honorable CHIEF district court judge, Alan B. Johnson, simply entered into the record as "true", "correct", "reliable" the accounts attributed to Mr. Nelson. Is it possible to conclude that because it was offered by a White counsel, therefore, it MUST be accurate and reliable? OR it is one of the several instances of the presiding judge's negligence and malice?

Petitioner will incur additional cost to acquire the transcript of this October

16, 1996 hearing if this Court deems it necessary.

B. Gist of the Appeal

At the end of the hearing, the Honorable CHIEF district court judge, Alan B. Johnson announced his "ruling" by granting the substance of the Respondents' motion - lack of jurisdiction (?). See A - 17, paragraph 3. This was done despite the duly submitted Petitioner's Reply and the appended exhibits.

The quoting of derogatory declarations by the presiding judge from authenticated declarations, and the derogatory, denigratory, defamatory and slanderous remarks and comments about this action by the presiding judge indicated to the Petitioner that this Honorable CHIEF district court judge did not even review the material presented in the Petitioner's Reply, and he was not inclined to apply the rules of law, specifically the Federal Rules of Evidence, Rules 106 and 901.

Petitioner decided to bring to the attention of the presiding judge these facts through three motions, filed on October 18, 1996:

(1) Lack of discussion of the Petitioner's Reply and Reply, Attachments A and B, although the Minute Order of September 23, 1996 announced a hearing of this reply brief during the October 16, 1996 hearing [See A - 12 for this Minute Order];

(2) lack of review of evidence, specifically, judge's quote of derogatory remarks about the Petitioner from unauthenticated declarations;

(3) lack of review of proposed amended complaint along with the duly submitted Reply brief; and

(4) granting of Respondents' motion - not clear which motion was granted, the original or the amended.

See A - 82 through A - 92 for the three motions.

In addition to containing different requests, the three motions also reflected the nature and substance of this action, multiple claims, based on different statutes and regulations.

On April 22, 1997, Petitioner received a series of district court's "rulings". They included orders denying amended complaint submitted by Petitioner. The three motions, submitted on October 18, 1996, were unilaterally combined into ONE motion by the presiding district court judge.

No reference was made about the Petitioner's Reply and its related contents, the Reply, Attachments A and B. The motion requesting review of the declarations and other disclosure components was denied. The leave to amend the complaint and the proposed amended complaint were also denied; although, Petitioner had requested that both be reviewed along with Petitioner's Reply.

On April 28, 1997, per direct district court's edict, Petitioner filed the Amended Complaint - II. Also on April 28, 1997, Petitioner filed the Notice of Appeal.

Thereafter, Petitioner filed an appeal with the United States Appeals Court for the Tenth Circuit; the appeal was about the intentional, malicious and racially-motivated omission and disregard of the contents of two motions, and the Reply brief and the leave to amend.

On August 4, 1997, Petitioner received Court of Appeals' Order, dated July 30, 1997, denying Petitioner's appeal. On October 9, 1997, Honorable CHIEF district court judge, Alan B. Johnson issued his order to transfer this ENTIRE action to the United States Court for Federal Claims. See A - 1 and A - 4, and A - 20 for Appeals Court's orders dated July 30 and October 9, 1997, and district court's order transferring this entire action to the United States Court of Federal Claims, respectively.

On October 24, 1997, Petitioner filed the motion for reinstatement of his appeal; and on December 8, 1998, Petitioner received a Court of Appeals' order denying Petitioner's motion for rehearing. And, on March 8, 1998, Petitioner filed a petition with this Court for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit which was returned on April 23, 1998 for correction.

C. Basis for Federal Jurisdiction in the Court of First Instance

Subpart 15.5 of 48 CFR or FAR § 15.5 prescribes policies and procedures for submission, receipt, and acceptance of unsolicited proposals. Any source outside the United States Government can submit unsolicited proposals. FAR § 15.5 is an unrestricted means of Federal procurement process. FAR § 15.504(a) requires potential offerors to conduct a "needs study" prior to the submission of detailed unsolicited proposals. See A - 31 for the FAR § 15.504(a).

This was done by the Petitioner to all agencies involved, including the Office of the Vice President, via the Office of the President, prior to submitting the unsolicited proposal.

Preliminary contacts were made through submission of a SYNOPSIS [not to be confused with the proposal's Abstract, as did the Honorable CHIEF district court judge, Alan B. Johnson in his "rulings"]. Copies of detailed unsolicited proposal were submitted to agencies with favorable responses to the synopsis. In some cases, requests for additional information about the proposal were received.

The second sub subparagraph of FAR § 15.506-1(c)(2) requires a timely response to offerors of the unsolicited proposals. Agencies have defined the FAR § 15.506-1(c)(2) requirement, "promptness", through regulation. NOTE: the expression "shall" in FAR § 15.506-1(c)(2) [second sentence, starting with the word "If"].

See FAR § 15.506-1(c)-(2) at A - 32. The time requirement, "timely response", ranges between 45 (forty five) and 60 (sixty) days. GSA (FAR § 515.506-2) sets it [the expression "shall"] at 45 days.

Respondents have failed to comply with this regulation, an intentional negligence and omission with malice and racial motivation.

28 U. S. C. § 1346(a)(2) is basically the Tucker Act. 28 U. S. C. § 1346(b) deals with claims against the United States, in civil actions, for injury resulting from negligent or wrongful act or omission by any United States government officials, including employees while acting within the scope of the United States government office or employment. See A - 30, for 28 U. S. C. § 1346(b).

In this action, injury is the basis used to establish a claim or claims; and the injury is a violation or breach of rights specified by any element of the Constitution, or Act of Congress or United States government regulations - in this case, the Federal Acquisition Regulations ("FAR"), specifically those noted at A - 32, FAR § § § 1.102(b)(3), 1.102(b)(4) and 1.102-2(c).

In establishing statutory grounds for a civil action against the United States for failure to comply, Petitioner referred to the following statutes:

> "1. This court has subject matter jurisdiction pursuant to Title 28 U. S. C. sections 1343.

2. This action is commenced pursuant to 41 U. S. C. sections 201 through 321, and sections 401 et seq., especially section 405 of the 41 U. S. C . and Pub. L. 93-400; and more specifically 41 U. S. C. § 416(c)(1)(D), and 41 U. S. C. sections 321 and 322 (Ch.199, § 1 & 2, 68 Stat.81, May 11, 1954)."

See p. 1, paragraphs 1 - 2 of the COMPLAINT; and A - 31 for the 41 U. S. C. § 401.

The objective was to combine the FAR § 15.506-1(c) provision with the 15 U. S. C. 637 [8(a) Program] as a mechanism for proposal funding.

Petitioner contents that failure by the employees and officials of the United States government to comply with the second sub subparagraph of FAR § 15.506-1(c) provision is a breach, an injury, resulting from negligent or wrongful act perpetuated by the United States government officials and employees as defined in 28 U. S. C. § 1346(b). These are negligent or wrongful acts prohibited by the Civil Rights Act of 1964, as amended, that is, 42 U.S.C. § § 1981, 1983 and 1988, under the 41 U. S. C. § 414(2) provisions, as related to FAR § 15.506-1(c).

Thus, this complaint is a <u>multiple claims</u> action, based on two different sets of statutes and regulations. Petitioner seeks relief under both the civil rights statutes, and the failure to comply with the FAR § 15.506-1(c)(2) regulation.

REASONS AND ARGUMENTS FOR ALLOWANCE OF THE WRIT

Petitioner believes and alleges that the United States Court of Appeals for the Tenth Circuit has: (a) decided an important federal question in a way that conflicts with relevant decisions of this Court, (b) so far departed from the accepted and usual course of judicial proceedings, and (c) sanctioned such a departure by the United States District Court.

Petitioner is asking this Court to exercise its supervisory power to review the Appeals Court's orders and opinions; thus, district court's orders, with respect to Petitioner's claimed rights under the "collateral order doctrine", and as a matter of law under the Equal Rights statutes.

A. Orders and Opinions Below

I. Rights under "Collateral Order Doctrine" as per Appeals Court Ruling

In its order dated July 30, 1997, the United States Court of Appeals for the Tenth Circuit dismissed Petitioner's appeal because "the court has not transferred the matter". Further, it was stated that the Appeals Court only reviews final decisions. "No exception to that rule is applicable here"; it cited 28 U. S. C. § 1291.

See A - 1 through A - 7 for the Appeals Court's orders and opinions.

In its order, dated December 8, 1997, the same Appeals Court denied the Appellant's motion to reinstate the appeal since "the order transferring the matter to the Court of Claims is not appealable". In support of its "ruling", the Appeals panel cited Raines v. Block, 798 F.2d 377, 279 (10th Cir. 1986) and Jesko v. United States, 713 F.2d 565, 567 (10th Cir. 1986).

Both of these precedents deal with the "collateral order doctrine".

Jesko v. United States, 713 F.2d 565-568 (1983) states in part:

> "Because the transfer order is interlocutory, it is nonappealable prior to final judgment unless it fits within the exception to the final judgment rule espoused in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-47 (1949). For an order to be appealable under the collateral order doctrine, it "must ...". Jesko v. United States, 713 F.2d 565 (1983), 565-568

Moreover, the appealability "must fit within the exception - claimed right which is not an ingredient of the cause of action and does not require consideration with it...". pp. 546-547, Cohen v. Beneficial Industrial Loan.

It seems that Jesko v. United States, 713 F.2d 565 (1983), 565-568 is based on both Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) and Van Cauwenberghe v. Biard, 486 U.S. 517.

This Court authorized exception to 28 U.S.C. § 1291 in the case of Cohen v. Beneficial Industrial Loan Corp. under the "collateral order doctrine". In establishing the "collateral order doctrine", this Court stated:

> "we hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it...". pp. 546-547, Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

In Van Cauwenberghe v. Biard, this language was refined, but not negated, by further stating:

> "If it (a) conclusively determines the disputed question, (b) resolves an important issue completely separate from the merits of the action, and (c) is effectively unreviewable on appeal from a final judgment. And, the final judgment rule applicable in federal courts pursuant to 28 U.S.C. 1291 requires that, except in certain narrow circumstances in which a right would be irretrievably lost absent an immediate appeal. p. 519, Van Cauwenberghe v. Biard, 486 U.S. 517; 108 S. Ct. 1945 (june, 1988)

These precedents firmly state the conditions under which a "final judgment" or "final order" may be appealable under the "collateral order doctrine", that is, final orders MUST contain breach or breaches of some rights which cannot be remedied at a later time or stage of the

litigation.

Thus, Petitioner disagrees with the December 8, 1997 order by the Appeals Court denying Petitioner's motion to reinstate his appeal stating that these claimed rights do NOT qualify under the "**collateral order doctrine**".

II. District Court's Orders

The United States Court of Appeals for the Tenth Circuit pointed out in its July 30, 1997 order, that "the district court granted the plaintiff's request to file an amended complaint." Thus, it affirmed the district court's order, thereby, deciding NOT to review the other motions.

Should the Appeals Court have reviewed said Petitioner's motions, it would have found that there were three <u>different</u> motions, with three <u>different</u> requests, duly submitted by the Petitioner on October 18, 1996; the three different motions were <u>UNILATERALLY</u> combined into one by the presiding judge; granted ONLY one of the three requests. See A - 16, paragraph 2.

This combined motion, which granted ONLY one request, imposed severe restrictions: Petitioner was FORCEFULLY COERCED AND DIRECTED to amend his complaint "**only insofar as necessary**" [See A - 18, paragraph 3] as to request transfer of this action or dismissal [See A - 18, paragraph 4], nothing else, although these motions were about three different requests.

The order itself, dated April 9, 1997, states:

> "Although these motions have different titles, they seek identical relief: Plaintiff seeks to amend his pleading to include claims under the Tucker Act and to have this case transferred to the United States Court of Claims pursuant to 28 U.S.C. § 1631. Because this is the second motion for leave to amend that plaintiff has filed the court will refer to it as plaintiff's second Motion for Leave to Amend."

See A - 16, paragr. 2.

This "ruling", by the Honorable CHIEF district court judge, Alan B. Johnson, is a misrepresentation and an erroneous statement, and a dishonest and an untruthful statement with the sole purpose of deceiving and hurting, a lie.

The three different motions, with three different requests, were combined and granted as one motion. See A - 82 through A - 92 for these motions.

Excerpts from these motions follows:

> "11. The "Declaration" attributed to Mr. Michael Nelson and other averments by the Defendant agency officials are fully discussed in the Plaintiff's REPLY and relevant exhibits, Attachment A. Apparently, this Court did NOT even review them prior to the hearing.
>
> WHEREFORE, Plaintiff prays that this Court would: (a) allow the review of

these Defendant agency official actions, especially the declaration attributed to Mr. Nelson and quoted by this Court through the amendments of the Plaintiff's pleadings to relate back as to conform to evidence, and/or to supplement pleadings, (b) accept the amended version of the Complaint and the Reply as the basis for the Amended pleadings for a hearing to review these averments by the defendant agency officials, recognizing the fact that the United States Court of Federal Claims lacks jurisdiction in these matters." See A - 91.

"5. On October 11, 1996, Plaintiff submitted an Amended Complaint and a Reply to the Defendant agencies' motion to dismiss, including Attachments A and B. It appears that this Court did NOT even review these documents, especially the Plaintiff's reply to Mr. Nelson' declaration. This Court quoted facts from Mr. Nelson's declaration which were never verified as to their accuracy and admissibility. And this was done by this Court at the very end of the hearing with NO connection at all with the so called Tucker Act.

6. Plaintiff must be allowed to challenge these averments in the United States District court environment.

7. The United States Court of Federal Claims does NOT have jurisdiction over Civil Rights Act matters.

WHEREFORE, Plaintiff requests that this Court allows the Plaintiff to amend his

plead under the Fed.R.Civ.P. 15(b) and specially Fed.R.Civ.P. 15 (c)(2) and Fed.R.Civ.P. 15(d) in light of this Court's judgment based strictly on Tucker Act and reference to incompetent declaration by defendant agency officials, and to effect transfer of those portions of the Plaintiff's pleadings which are under the jurisdiction of the United States Court of Federal Claims, pursuant to 28 U.S.C. § 1631." See A - 83 through A - 84.

"Pursuant to 28 U.S.C. § 1631 provisions and under the RCFC 84(a), Plaintiff requests a transfer of those portions of the Complaint, including the Amended version and the Reply, which fall under the jurisdiction of the United States Court of Federal Claims, as determined by this Court in its judgment of October 16, 1996, be transferred to the United States Court of Federal Claims.

WHEREFORE, Plaintiff requests that, in the interest of JUSTICE [28 U.S.C. § 1631], those portions of the Complaint, including the Amended version and the Zeply, which fall under the jurisdiction of the United States Court of Federal Claims, as determined by this Court, be transferred to the United States Court of Federal Claims, pursuant to 28 U.S.C. § 1631." See A - 86.

It is difficult to deduct from these motions that they all:

" ... seek identical relief: Plaintiff

seeks to amend his pleading to include claims under the Tucker Act and to have this case transferred to the United States Court of Claims pursuant to 28 U.S.C. § 1631." See A - 16, paragr. 2.

B. Breached and Obliterated Petitioner's Rights by the District Court Orders

It is ridiculous and dishonest to interpret these motions as just seeking the same/identical relief. Combing these motions in this manner and granting only the option favorable to the presiding judge is equivalent to knowingly ignoringl and maliciously dismissing or denying Petitioner's rights. This is a typical example of judicial partiality, racial bias. It is distressing and disturbing to note that such a breach is being inflicted by a CHIEF district court judge, a most senior guardian of the judicial system of this country.

Petitioner's rights to present and review evidence and respond to the district court judge's quotes, and to challenge declarations reported in the Respondents' "Defendants' Initial Rule 26 Disclosure", and seek relief under the civil rights statutes are deprived, obliterated. Note also that the amended Petitioner's complaint was denied and Petitioner's Reply brief was disregarded, although one of the requests was that the amended complaint be reviewed along with the Reply brief.

Brief discussions of these claimed rights are presented below.

[A] During the October 16, 1996 hearing of this case, Honorable CHIEF district court judge, Alan B. Johnson, knowingly quoted derogatory remarks from unauthenticated declarations whose admissibility is in controversy. Yet, he denied Petitioner the right to challenge these same declarations in his court.

Recent rulings by this Court about the role of evidence are reflected in Jack Anderson, et al. v. Liberty Lobby, Inc. and Willis A. Carto, 477 U.S. 242, [or 91 L. Ed. 2d 202; 106 S. Ct 2505] (June, 1986). In Jack Anderson, et al. v. Liberty Lobby, Inc, this Court held that:

> "... the weighing of evidence, the determination of credibility of declaration or affirmation, and drawing of the inferences from the facts are and MUST remain an integral part of jury function".

Thus, for a judge to do so is equivalent to the misuse and abuse of judicial authority.

In this case, the jury and the judge were the same entity, deciding on the admissibility of these declarations WITHOUT any consideration given to the other party's evidentiary documentation. The CHIEF district court judge simply entered into the record as "true", "correct", "reliable", the accounts attributed to Messrs. Nelson and Lieber.

One cannot escape to conclude that because these declarations were offered by a White counsel, therefore, they MUST be

believable, accurate, true, reliable! It is also fair to note that the Honorable CHIEF district court judge, Alan B. Johnson is a White person.

If, this is a BIG IF, the Honorable CHIEF district court judge has taken time to read the Petitioner's Reply and was inclined to rule "on the merits of this case", he would have evaluated the elements of unauthenticated declarations that he quoted from, and he would have found out that these declarations constitute a perjury, and specifically he would have noted that:

a) Mr. Nelson did write a letter, dated November 19, 1994 and did converse with the Petitioner in November, 1994 and NOT 1993 as claimed; see A - 35;

b) Mr. Lieber's letter, dated August 9, 1995, NOT 1993 as claimed; see A - 40;

c) the January 12, 1995 letter by Mr. Bill Mason, Director of Correspondence for the Vice President (Al Gore) at A - 39; and

d) Mr. Marc R. Weissman letters of August 19, 1995 and March 29, 1996 [and NOT 1993 as claimed] at A - 36 through A - 38.

These letters show that the Respondents did not comply with the time requirement of "promptness" set in the FAR § 15.506-1(c)(2) regulation. Mr. Weissman's letter of March 29, 1996 shows the lack of objectivity exhibited by the GAO in this case.

The request for the review of unauthenticated declarations was denied, along with the other two motions; these disregarded, omitted motions included the requests/rights to:

(a) review and authenticate declarations quoted by the presiding judge;

(b) respond to derogatory remarks, and denigratory, defamatory and slanderous comments by the presiding judge; and

(c) request the review of the Petitioner's proposed amended complaint along with his Reply and leave to amend.

Federal Rules of Evidence, Rules 106 and 901, require review or hearing of the "preliminary questions" concerning the admissibility oμ evidence in any proceedings in any Federal district court.

The presiding district court judge simply disregarded the application of these rules; instead, he unilaterally and liberally granted himself judicial authority and statutory licence to freely, conveniently, dubiously quote from unauthenticated declarations; he categorically and emphatically refused to grant the Petitioner the right to present evidence to respond to his quotes.

[B]. Attempts by the presiding judge to deprive Petitioner of his racial and ethnic heritage [as defined by law], and 8(a) program participation are reflected in the following components of the "rulings on the merits of the case", Honora-

ble CHIEF district court judge, Alan B. Johnson's style:

> "At oral argument, plaintiff contended that all of the government agencies involved were aware that he was a minority because in his synopsis submitted with his unsolicited proposals he identified himself as minority by inclusion of the following statement regarding his company: "MESU Associates, an 8(a) firm, submits ...". See A - 24, middle of the second paragraph.

Again, there was no discussion about the motion to amend and the proposed amended complaint at all during the hearing. The 8(a) firm was referenced in connection with the cited authorities by the Respondents. Also there was only one proposal submitted. There is no synopsis submitted with the proposal. A synopsis is NOT an abstract. A synopsis is provided to prospective agencies as required under FAR § 15.504(a). This was done by Petitioner prior to submitting the full and detailed proposal; proposal was submitted along with the proposal's Abstract. See A - 72 through A - 81 for the proposal's Abstract.

[C]. Another misrepresentation is represented by the following the district court judge's "ruling on merits":

> "Having carefully consider the motion to amend and the proposed amended complaint, plaintiff fails to allege that defendants refused to enter into a contract because of racial animus." See A - 25, middle paragraph.

Petitioner alleges that Respondents did not comply with the sub subparagraph of FAR § 15.506-1(c) provision - informing the Petitioner of the final disposition of the proposal timely; these letters by Messrs. Nelson and Lieber [see pp. 22-23 of this petition] show that they lied about complying with the sub subparagraph FAR § 15.506-1(c), which is also a violation of the 28 U.S.C. § § 1731 and 1746 provisions, a perjury; this is noted at A - 90, paragraph 10.

Both Messrs. Nelson and Lieber knew that the proposal was being submitted by an 8(a) firm. The presiding CHIEF district court judge, Alan B. Johnson, conveniently granted himself the right to quote from unauthenticated declarations, and yet, he denied the Petitioner the right to challenge them and present related evidence.

[D] "... The Court has considered the entire file ...". *Id.*

This is another misrepresentation, a dishonest and deceitful statement, a lie. For instance, Petitioner's Reply brief and the other two motions are part of the ENTIRE file of this case. The Reply contained information about Petitioner's racial and ethnic heritage, elements required to establish this case's jurisdictional basis. See pp. 1 - 2, in this Petition, about the Respondents' jurisdictional argument. The Reply and the other two motions were disregarded and NOT considered at all.

[E]. In the order denying the motion to amend, the presiding judge stated:

> "This matter came before the court on October 16, 1996, for hearing on pending motions including plaintiff's first Motion to Request a [sic] Leave of Court in Order to Amend the Plaintiff's Complaint (hereinafter first Motion to Amend) filed on October 11, 1996. The Court has considered the entire file, heard argument of counsel and of plaintiff appearing pro se and is fully advised." See A - 22, first paragraph.

This is simply a false statement, a lie. No discussion of motion for leave to amend took place during the October 16, 1996 hearing.

[F]. Another misrepresentation is the OMISSION of the expression "***only insofar as necessary***". It was completely, conveniently, maliciously, intentionally OMITTED from his "Order directing transfer of case to court of claims". In fact, that portion of his order reads:

> "This matter came before the court on plaintiff's Amended Complaint. On April 29, 1997 [SIC], this court granted plain tiff's request to file an amended complaint for the purpose of clarifying that he seeks relief under the Tucker Act. The order further provided that if plaintiff did not file such an amend complaint within ten days, the case would be dismissed without further notice or hearing. Plaintiff filed his Amended Complaint with-

in ten day period." See A - 22, first paragraph.

The October 9, 1997 order was issued after the Honorable CHIEF district court judge found out that his orders are being appealed to the Court of Appeals.

The district court's April 9, 1997 order, [and NOT April 29, 1997 as stated in the order] granting the motion to amend Plaintiff's complaint was issued under the following directives, edicts:

> "ORDER that plaintiff's secΩnd Motion to Request a [sic] Leave of Court to Amend Plaintiff's Pleading is **GRANTED** and plaintiff has ten days from the entry of this order to amend his complaint ***only insofar as necessary*** to clarify that he seeks relief under the Tucker Act." [The emphasis is Plaintiff's]. See A - 18.

The implication of this omission is for the appeals court to infer and imply that Petitioner voluntarily transferred the <u>entire</u> action to the United States Court of Federal Claims which is incorrect.

<u>CONCLUSION, EQUAL RIGHTS UNDER RULES OF LAW</u>

Petitioner's claimed rights involve an important issue of equal rights under the law, that is, the right to <u>equal application of rules of law</u>.

Full and equal benefit of all laws and proceedings for ALL persons within the

jurisdiction of the United States is a proposition generally accepted by this society, and it is fair to assume that it is also widely viewed as one of the cornerstones of the American judicial system.

Equal rights under law also ensures protection of civil rights of ALL litigants [regardless of their race (genetic composition and structure), gender, ethnic and national origins, ...], thus, equal justice under law.

Petitioner, as an African American citizen of the United States, enjoys the same rights as the white citizens in this country to give evidence. See A - 29 for the 42 U.S.C. § 1981(a) [NOT to be confused with the 42 U.S.C. §1981a, as did the presiding judge in this case]. Petitioner NEVER claimed the use of the 42 U.S.C. § 1981a provisions.

Any breach, obliteration, denial or omission of these rights leads to UNEQUAL JUSTICE under law. The "rulings", orders, issued by HΩnorable CHIEF district court judge, Alan B. Johnson amount to obliteration, breach and denial of Petitioner's rights. This has resulted in the unfair litigation process and unequal justice under law.

In this case, breaches, violations, and obliterations oo Petitioner's rights have occurred in the following specific areas, the rights to:

(a) respond to incompetent and irresponsible quotes by the presiding district court judge from unauthenticated

declarations:

i) declarations which were NEVER reviewed or heard under the rules of Federal Rules of Evidence, Rules 106 and 901; see A - 33 for the Rules 106 and 901;

ii) these declarations were submitted by Respondents in their Initial Rule 26 Disclosure;

(b) respond to derogatory remarks and comments, specifically denigrating, defamatory and slanderous comments about Petitioner's action; and derogatory remarks about Petitioner's oposed amended complaint;

(c) submit Reply brief, duly authorized by the presiding judge, and for that reply brief to be reviewed and NOT simply disregarded or ignored, dismissed without any judicial review and explanation, and yet, Respondents' motions denying Petitioner's rights, under the Civil Rights Act of 1964 [as amended] was granted; Petitioner's Reply established his action's jurisdiction under the 42 U. S. C. § 1981(a), a Civil Rights statute;

(d) formulate and submit requests for court's judicial review within rules of law, and for those requests to be granted or denied within the rules of law;

(e) use 15 U.S.C. § 637 provisions, 8(a) Program, yet, Respondents's motion to deny Petitioner's right to invoke the 28 U.S.C. § 1346(b) provision was granted.

Thus, these district court orders which deny, breach and obliterate Petitioner's rights fit the nature, substance, and characteristics of "collateral order doctrine". Petitioner assumes that the Equal Rights under rules of law is the basis for equal justice. It is fair to note that the counsel for the Respondents is a white male, and the Honorable CHIEF district court judge, Alan B. Johnson, is a white male; the Petitioner is an African American, citizen of the United States of America, currently residing in the State of Colorado, filing pro se.

Petitioner requests that this Court reviews and examines the nature, substance, and characteristics of the Petitioner's claimed rights and their applicability to the "collateral order doctrine", as a matter of law under the Equal Rights statutes.

For the foregoing reasons, Petitioner asserts that his claimed rights fall within the "collateral order doctrine"; hence, he respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

André Kimboko, PhD
Petitioner/Pro Se

Supreme Court, U.S.

F I L E D

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

ANDRE KIMBOKO

Petitioner

v.

UNITED STATES, et al.

Respondents

Petition For Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

APPENDIX

André Kimboko, Petitioner/*Pro se*
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Tel. No. (970) 330-1389

APPENDIX

I. APPEALS COURT ORDERS

ORDER dated July 30, 1997: The United States Court of Appeals for the Tenth Circuit dismissed Appellant's appeal for lack of jurisdiction, the district court's orders did not constitute "final order". . . . . A - 1

ORDER dated and filed December 8, 1997: The United States Court of Appeals for the Tenth Circuit denied the Appellant's motion to reinstate the appeal since "the order transferring the matter to the Court of Claims is not appealable". . . . . A - 4

Rehearing (December 24, 1997): An Order on Rehearing: It seems that the appeals court's order issued on December 8, 1997 was a rehearing order, although it was in response to the Petitioner's motion for reinstatement of the appeal. See December 24, 1997 Letter by the United States Court of Appeals for the Tenth Circuit, Office of the Clerk . . . . . A - 6

II. DISTRICT COURT ORDERS

MINUTE ORDER (September 4, 1996) entered by Chief Judge Alan B. Johnson, dated September 4, 1996, granting Respondents time to respond to Petitioner's Motion for Summary Judgment, filed September 3, 1996. . . . . A - 8

MINUTE ORDER (dated September 10, 1996) entered by Chief Judge Alan B. Johnson, dated September 10, 1996, scheduling date, time and place (location) for hearing of Petitioner's motion for a summary judgment. . . . . A - 10

MINUTE ORDER (September 23, 1996) entered by Chief Judge Alan B. Johnson, dated September 23, 1996, to explain the Minute Order entered on September 25, 1996 and setting the due date of October 11, 1996 for reply brief to the Respondents' "motion to dismiss/summary judgment", filed September 23, 1996. . . . . A - 12

MINUTE ORDER (September 25, 1996) entered by Chief Judge Alan B. Johnson, dated September 25, 1996 granting leave to file reply brief to the Respondents' motion to dismiss . . . . . A - 14

APRIL 9, 1997 Order Granting Plaintiff's Motion to Cure Jurisdictional Grounds as They Relate to the Relief and Claims to be Sought under the United States Court of Claims; and Granting Plaintiff's Second Motion to Request a Leave of Court to Amend Plaintiff's Pleading and Request Transfer of Certain Portions of the Claims for Relief to the United States Court of Federal Claims; and Ordering Transfer or Dismissal . . . . . A - 16

OCTOBER 6, 1997 Order Directing Transfer of Case to Court of Claims . . . A - 20

APRIL 9, 1997 Order Denying Plaintiff's First Motion for Leave to File Amended Complaint . . . . . A - 22

III. STATUTES, REGULATIONS, FEDERAL RULES OF EVIDENCE

A. Statutory Provisions

Civil Rights Act of 1964, as amended, Equal Rights under the Law:

42 U.S.C. § 1981(a) . . . . . A - 29

42 U.S.C. § 1981a . . . . . A - 29

28 U.S.C. § 1346(b) . . . . . A - 30

41 U.S.C. § 401 . . . . . A - 31

B. Regulations - Federal Acquisition Rules ("FAR"):

FAR § 15.504 . . . . . A - 31

FAR § 15.506-1(c) . . . . . A - 31

FAR § 1.102 . . . . . A - 31

FAR § 1.102-2 . . . . . A - 31

C. Federal Rules of Evidence

Rule 106 . . . . . A - 33

Rule 901 . . . . . A - 33

D. Local Rules

D.C.COLO.L.R. 7.1(F) . . . . . A - 34

VI. PETITIONER'S PLEADINGS AND RELATED DOCUMENTS

Handwritten letter dated November 19, 1994 by Mr. Michael Nelson, the Proposal Contact Person whose Declaration is the Respondents' Initial Rule 26 (Alleged to have had telephone conversations in November, 1993). . . . . A - 35

HHS's letter of August 9, 1995, under the signature of Mr. Marc Weisman, Director of Acquisition Policy and Oversight [HHS], recognized the HHS's mishandling of the proposal . . . . . A - 36

HHS's response, letter of March 29, 1996 under the signature of Mr. Marc Weisman, Director of Acquisition Policy and Oversight [HHS] to the Plaintiff's inquiry about the agency's complaint response. NOTE the GAO's complicity in this case. This is the same GAO that the Respondents wanted the District Court to believe to be honest and responsible agency A - 38

Response from the Vice President delegating Mr. Nelson's responsibilities as the Proposal Contact Person to the DOC, under the signature of Mr. Bill Mason, Director of Correspondence for the Vice President . . . . . A - 39

DOT's Official, Mr. Richard A. Lieber's letter, dated August 16, **1995** who has alleged that he responded, in writing, to the proposal in **1993**, according to the averment contained in the Respondents' Initial Rule 26; also a response to the Plaintiff's request, under the FOIA, do NOT show any other correspondence from Mr. Lieber regarding the

proposal's status . . . . . A - 40

Motion to Request Leave of Court to Reply to the Response Provided by the Defendants Regarding the Plaintiff's Motion to Seek for a Summary Judgment . . . . . A - 42

REPLY to the Defendant Agencies' Response Regarding the Plaintiff's Motion for Summary Judgment, and Defendants' Motion to Dismiss. . . . . A - 44

Proposal's "ABSTRACT" . . . . . A - 72

The Three Motions [from A - 82 to A - 92]

(a) Motion to Request a Leave of Court to Amend Plaintiff's Pleading and to Request Transfer of Certain Portions of the Claims for Relief to the United States Court of Federal Claims . .A - 82

(b) Motion to Cure Jurisdictional Grounds as they Relate to the Relief and Claims to be Sought under the United States Court of Federal Claims . .A - 85

(c) Motion to Amend Plaintiff's Pleading to Relate Back as to Conform to Evidence, and or to Supplement Pleadings . . . . . A - 88

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANDRE KIMBOKO

Plaintiff - Appellant No. 97-1160

v.

United States of America, on Behalf of its agencies, agency heads and officials, and other government officials; **MICHAEL KANTOR**, Acting Secretary, Federal Department of Commerce (DOC); **LARRY IRVING**, Assistant Secretary for Communications and Information, and Administrator, NTIA, via Acting Secretary; **SHIRLEY S. CHAETER**, Secretary, Federal Department of Health and Human Services (HHS); **MARC R. WEISMAN**, Director, Division of Acquisition Policy and Oversight, via Shirley Chater, Federal Department of Health and Human Services (HHS); **JESSE BROWN**, Secretary, Federal Department of Veterans Affairs (VA); **MARILYN MARTIN**, Acting director, Acquisition Operations Service, via Secretary Jesse Brown, Federal Department of Veterans Affairs (VA); **FEDERICO PENA**, Secretary, Federal Department of Transportation (DOT); **RICH LIEBER**, Procurement Operation Division, via Secretary Federico Pena, Federal Department of Transportation (DOT); **BILL MASON**, Director of Correspondence for the Vice President, via Al Gore, Vice President of the United States of America; **MICHAEL R. NELSON**, Special Assistant to the President of the United States of America, Office of Science and Technology Policy, The White House

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ORDER

Filed July 30, 1997

Before **PORFILIO**, **BRORBY** and **EBEL**, Circuit Judges

This appeal is jurisdictional defective because no final order has been entered. *See* 28 U.S.C. § 1291.

In an order dated April 9, 1997, entered on April 22, the district court granted the plaintiff's request to file an amended complaint, giving the plaintiff until 10 days after entry of the order to file the amended complaint. The court stated that if the plaintiff failed to file an amended complaint clarifying that he seeks relief under the Tucker Act the case would be dismissed without further notice or hearing; if, however, the plaintiff filed the amended complaint, the matter would be transferred to the Federal Court of Claims.

On April 29, the plaintiff filed an amended complaint as well as a notice of appeal. Although the plaintiff followed the district court's directive in filing the amended complaint, the court has not transferred the matter.

Because the matter is still pending in the district court there is no final appealable order. *See Thompson v. Dereta*, 709 F.2d 1343 (10th Cir. 1983). This court has jurisdiction to review only

final decisions, 28 U.S.C. § 1291, and specific type of interlocutory orders. A final decision is one that disposes of all issues on the merits and leaves nothing for the court to do but execute the judgment. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988). No exception to that rule is applicable here.

APPEAL DISMISSED

Entered for the Court

PATRICK FISHER, Clerk of Court

"s/Ellen Rich Reiter"

Deputy Clerk/Appeals Expediter

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANDRE KIMBOKO

Plaintiff - Appellant No. 97-1160

v.

United States of America, on Behalf of its agencies, agency heads and officials, and other government officials; **MICHAEL KANTOR**, Acting Secretary, Federal Department of Commerce (DOC); **LARRY IRVING**, Assistant Secretary for Communications and Information, and Administrator, NTIA, via Acting Secretary; **SHIRLEY S. CHAETER**, Secretary, Federal Department of Health and Human Services (HHS); **MARC R. WEISMAN**, Director, Division of Acquisition Policy and Oversight, via Shirley Chater, Federal Department of Health and Human Services (HHS); **JESSE BROWN**, Secretary, Federal Department of Veterans Affairs (VA); **MARILYN MARTIN**, Acting director, Acquisition Operations Service, via Secretary Jesse Brown, Federal Department of Veterans Affairs (VA); **FEDERICO PENA**, Secretary, Federal Department of Transportation (DOT); **RICH LIEBER**, Procurement Operation Division, via Secretary Federico Pena, Federal Department of Transportation (DOT); **BILL MASON**, Director of Correspondence for the Vice President, via Al Gore, Vice President of the United States of America; **MICHAEL R. NELSON**, Special Assistant to the President of the United States of America, Office of Science and Technology Policy, The White House

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ORDER

Filed December 8, 1997

Before **PORFILIO**, **BRORBY** and **EBEL**, Circuit Judges

The plaintiff's motion to reinstate this appeal is **DENIED**.

The order transferring the matter to the Court of Claims is not appealable. *See Raines v. Block*, 798 F.ed 377, 379 (10th Cir. 1986); *Jesko v. United States*, 713 F.2d 565, 567 (10th Cir. 1983).
Entered for the Court

PATRICK FISHER, Clerk of Court

"s/Ellen Rich Reiter"

Deputy Clerk/Appeals Expediter

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK

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PATRICK FISHER
CLERK

ELISABETH A. SHUMAKER
CHIEF DEPUTY CLERK

December 24, 1997

Mr. Andre Kimboko
2736 W. 22nd Street
Greeley, CO 80631

Re: KIMBOKO v. USA

Dist/Ag docket: 96-WY-1305-AJ

Dear Mr. Kimboko:

Your motion for reconsideration is being returned without action. Under Tenth Circuit Rule 40.3 the court will accept only one petition for rehearing from any party to an appeal and, regardless of the nature or substance of the motion, will not accept any motion to reconsider the court's ruling on a petition for rehearing.

Please contact this office if you have questions.

Sincerely,

PATRICK FISHER
Clerk

"s/ ...."
Deputy Clerk

FF: hrs

cc: Henry L. Solano, U.S. Attorney
Robert D. Clark

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-1305-AJ

ANDRE KIMBOKO
Plaintiff(s)
v.
UNITED STATES OF AMERICA, et al.,
Defendant(s)

MINUTE ORDER

Minute Order entered by Chief Judge Alan B. Johnson, sitting by designation:

Defendants shall have up to and including September 23, 1996, to respond to plaintiff's motion for summary judgment, filed September 3, 1996.

Dated: September 4, 1996

A copy of this minute order was mailed to the following on September 4, 1996:

JAMES R. MANSPEAKER, CLERK

André Kimboko
2736 W. 22nd St.
Greeley, CO 80631

cc: Magistrate Judge Pringle

"s/Glenna Drake"

Deputy Clerk

Robert Clark
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-1305-AJ

ANDRE KIMBOKO

Plaintiff(s)

v.

UNITED STATES OF AMERICA, et al.,

Defendant(s)

MINUTE ORDER

Minute Order entered by Chief Judge Alan B. Johnson, sitting by designation:

A hearing on plaintiff's motion for summary judgment is scheduled for October 16, 1996, at 1:15 p.m. in Courtroom A., the Byron White United States Courthouse, 18th and Stout Streets, Denver, Colorado.

Dated: September 10, 1996

A copy of this minute order was mailed to the following on September 10, 1996:

JAMES R. MANSPEAKER, CLERK

André Kimboko
2736 W. 22nd St.
Greeley, CO 80631

cc: Magistrate Judge Pringle

"s/Glenna Drake"
Deputy Clerk

Robert Clark
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-1305-AJ

ANDRE KIMBOKO

Plaintiff(s)

v.

UNITED STATES OF AMERICA, et al.,

Defendant(s)

MINUTE ORDER

Minute Order entered by Chief Judge Alan B. Johnson, sitting by designation:

Plaintiff shall have up to and including October 11, 1996, to respond to defendants' motion to dismiss/summary judgment, filed September 23, 1996. This motion will be heard at the already scheduled hearing on October 16, 1996, at 1:15 p.m. in Courtroom A, the Byron White United States Courthouse, 18th and Stout Streets, Denver, Colorado.

Dated: September 23, 1996

A copy of this minute order was mailed to the following on September 23, 1996:

JAMES R. MANSPEAKER, CLERK

André Kimboko
2736 W. 22nd St.
Greeley, CO 80631

cc: Magistrate Judge Pringle

"s/Glenna Drake"
Deputy Clerk

Robert Clark
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-1305-AJ

ANDRE KIMBOKO

Plaintiff(s)

v.

UNITED STATES OF AMERICA, et al.,

Defendant(s)

MINUTE ORDER

Minute Order entered by Chief Judge Alan B. Johnson, sitting by designation:

The motion, filed by plaintiff on September 25, 1996, requesting permission to file a reply, is granted.

Dated: September 25, 1996

A copy of this minute order was mailed to the following on September 25, 1996:

JAMES R. MANSPEAKER, CLERK

André Kimboko
2736 W. 22nd St.
Greeley, CO 80631

cc: Magistrate Judge Pringle

"s/Glenna Drake"
Deputy Clerk

Robert Clark
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-1305-AJ

ANDRE KIMBOKO

Plaintiff(s)

v.

UNITED STATES OF AMERICA, et al.,

Defendant(s)

ORDER GRANTING PLAINTIFF'S MOTION TO CURE JURISDICTIONAL GROUNDS AS THEY RELATE TO THE RELIEF AND CLAIMS TO BE SOUGHT UNDER THE UNITED STATES COURT OF FEDERAL CLAIMS; AND GRANTING PLAINTIFF'S SECOND MOTION TO REQUEST A LEAVE OF COURT TO AMEND PLAINTIFF'S PLEADING AND TO REQUEST TRANSFER OF CERTAIN PORTIONS OF THE CLAIMS FOR RELIEF TO THE UNITED STATES COURT OF FEDERAL CLAIMS; AND ORDERING TRANSFER OR DISMISSAL

This matter came before the court on plaintiff's Motion to Cure Jurisdictional Grounds as they Relate to the Relief and Claims to be Sought Under the United States Court of Claims and Plaintiff's Motion to Request a [sic] Leave of Court to Amend Plaintiff's Pleading and to Request Transfer of Certain Portions of the Claims for Relief to the United States Court of Federal Claims.

Although these motions have different titles, they seek identical relief:

Plaintiff seeks to amend his pleading to include claims under the Tucker Act and to have this case transferred to the United States Court of Claims pursuant to 28 U.S.C. § 1631. Because this is the second motion for leave to amend that plaintiff has filed the court will refer to it as plaintiff's second Motion for Leave to Amend.

At the close of the hearing on October 16, 1997, the court announced its decision to grant defendants' Motion to Dismiss for lack of jurisdiction.

This court found that plaintiff's claim that the defendants should have entered into a contract with his company to purchase an "online internal retrieval system/network for federal executive branch unpublished full-text documents" was a pre-award contract claim against the United States and that exclusive jurisdiction over such claims was in the Federal Court of Claims.

Plaintiff now moves to transfer his complaint pursuant to 28 U.S.C. § 1631. That section provides:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been

brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred. As noted by the defendants, exclusive jurisdiction over plaintiff's complaint is in the Federal Court of Claims. It appears in the best interest of justice for this case to be transferred to the Federal Court of Claims rather than dismissed.

It is therefore

ORDERED that plaintiff's Motion to Cure Jurisdictional Grounds as they Relate to the Relief and Claims to be Sought Under the United States Court of Federal Claims is **GRANTED**. It is further

ORDERED that plaintiff's second Motion to Request a [sic] Leave of Court to Amend Plaintiff's Pleading is **GRANTED** and plaintiff has ten days from the entry of this order to amend his complaint only insofar as necessary to clarify that he seeks relief under the Tucker Act. It is further

ORDERED that IF PLAINTIFF FAILS TO AMEND HIS COMPLAINT to clarify that he seeks relief under the Tucker Act within ten days as provided above, THIS CASE **SHALL BE DISMISSED WITHOUT FURTHER NOTICE OR HEARING**. It is further

ORDERED that if plaintiff timely files an amended complaint to state a claim

under the Tucker Act, pursuant to 28 U.S.C. § 1631, this case shall THEREAFTER BE TRANSFERRED TO THE UNITED STATES COURT OF FEDERAL CLAIMS.

DATED this 9th day of April 1997.

"s/ ALAN B. JOHNSON"

CHIEF UNITED STATES DISTRICT JUDGE
BY DESIGNATION

Case Number: 96-WY-1305-AJ

I certify that I mailed a copy of the attached to the following:

Dated: April 21, 1997

JAMES R. MANSPEAKER, CLERK

"s/Glenna Drake"
Deputy Clerk

André Kimboko
2736 W. 22nd St.
Greeley, CO 80631

cc: Magistrate Judge Pringle

Robert Clark
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-1305-AJ

ANDRE KIMBOKO

Plaintiff(s)

v.

UNITED STATES OF AMERICA, et al.,

Defendant(s)

ORDER DIRECTING TRANSFER OF CASE TO COURT OF CLAIMS

This matter came before the court on plaintiff's Amended Complaint. On April 29, 1997, this court granted plaintiff's request to file an amended complaint for the purpose of clarifying that he seeks relief under the Tucker Act. The order further provided that if plaintiff did not file such an amende complaint within ten days, the case would be dismissed without further notice or hearing. Plaintiff filed his Amended Complaint within ten day period. However, he also filed a Notice of Appeal so no further action was taken pending resolution of the appeal.

On July 30, 1997, the Tenth Circuit Court of Appeals filed its Order dismissing the appeal for the reason that there is no final appealable order.

It is therefore

ORDERED that this case alleging a claim under the Tucker Act be transferred to the United States Court of Claims.

DATED this 6th day of October, 1997.

"s/ ALAN B. JOHNSON"

CHIEF UNITED STATES DISTRICT JUDGE
BY DESIGNATION

Case Number: 96-WY-1305-AJ

I certify that I mailed a copy of the attached to the following:

Dated: October 9, 1997

JAMES R. MANSPEAKER, CLERK

"s/Glenna Drake"
Deputy Clerk

André Kimboko
2736 W. 22nd St.
Greeley, CO 80631

cc: Magistrate Judge Pringle

Robert Clark
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-1305-AJ
ANDRE KIMBOKO
Plaintiff(s)
v.
UNITED STATES OF AMERICA, et al.,
Defendant(s)

ORDER DENYING PLAINTIFF'S FIRST MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

This matter came before the court on October 16, 1996, for hearing on pending motions including plaintiff's first Motion to Request a [sic] Leave of Court in Order to Amend the Plaintiff's Complaint (hereinafter first Motion to Amend) filed on October 11, 1996. The Court has considered the entire file, heard argument of counsel and of plaintiff appearing pro se and is fully advised.

Federal Rule of Civil Procedure 15(a) allows amendments of pleadings after a responsive pleading has been served by leave of court or by written consent of the adverse party. Leave to amend "shall be freely given when justice so requires." *Id.* However, consideration of the futility of the proposed amendment tempers the strong policy permitting the amendment of pleadings. *Baal Corp. Liquidation Trust v. Valleylab, Inc.*, 927 F.Supp. 1350, 1374 (D.Colo. 1996). If an amendment to a complaint would be futile, it may be denied. *Id.*

Plaintiff seeks to amend his complaint to add claims pursuant to "the Civil Rights act of 1964 as amended, 42 U.S.C. § § 1981, 1983 and 1988, 15 U.S.C. § 637" and contends these claims would give this court jurisdiction over his complaint pursuant to 28 U.S.C. § 1343. Plaintiff filed his proposed amended complaint and the court has carefully considered it.

This court will not grant leave to amend a complaint if such amendment would be futile. It would be futile to allow plaintiff to file a proposed amended complaint that fails to state a claim under the statutes he cites for the following reasons. Plaintiff fails to allege that any defendant has acted under color of state law as required to state a claim under 42 U.S.C. § 1983. Section 1988 is a provision allowing an award of attorney's fees to a prevailing party in a civil action rights action but does not provide a substantive cause of action.

All defendants other than the United States have been named in their official capacity only. None of these defendants have been served with the complaint or proposed amended complaint and relief is not sought against any defendant in his or her individual capacity. Therefore the court need not consider whether plaintiff's amended complaint states a claim against defendant in his or her capacity.

Plaintiff's proposed amended complaint fails to state a claim against defendant United States under 42 U.S.C. § 1981. Section 1981 guarantees to all persons within the jurisdiction of the United

States equal rights "to make and enforce contracts."

To state a § 1981 claim, the plaintiff must allege facts to support the following three elements: 1) that the plaintiff is a member of a racial minority; 2) that the defendant has an intent to discriminate on the basis of race, and 3) that the discrimination concerned one or more of the activities enumerated in the statute. *Garg v. Albany Industrial Development Agency*, 899 F.Supp. 961 (N.D.N.Y. 1995) (*citing Miam v. Donaldson, Lufkin & Jenrete Secs. Corp.*, 7 F.3d 1085, 1087 (2nd Cir. 1993)).

Plaintiff's proposed amended complaint does not contain an allegation that he is a racial minority. However, in his Motion to Amend he does allege that he is an African American and therefore is a member of a racial minority. He further alleges that defendants violated his civil rights by their actions "solely because of the plaintiff's race, color, ethnicity and national origin; actions, OR [sic] unlawful acts and practices, prohibited under 28 U.S.C. § 1343 and other Civil Rights statutes ... " At oral argument, plaintiff contended that all of the government agencies involved were aware that he was a minority because in his synopsis submitted with his unsolicited proposals he identified himself as minority by inclusion of the following statement regarding his company: "MESU Associates, an 8(a) firm, submits ..."

Because plaintiff is acting pro se, this court construes his pleading libera-

lly. *George v. HEK America, Inc.*, 157 F.R.D. 489 (D. Colo. 1994). Accordingly, this court will read the Motion to Amend and proposed amended complaint together to determine if plaintiff states a claim and therefore amendment would not be futile.

Having carefully consider the motion to amend and the proposed amended complaint, plaintiff fails to allege that defendants refused to enter into a contract because of racial animus. Similarly, he fails to allege intent to discriminate on the basis of race, an essential element of a claim under section 1983. *See Fitzgerald v. Mountain States Telephones and Telegraph Co.*, 68 F.3d 1257 (10th Cir. 1995)("liability under § 1981 requires proof of intentional discrimination."). An examination of plaintiff's prayer for relief in his proposed amended complaint illustrates the deficiencies:

> 17(b). Finding the defendants, specifically referred to in paragraph 4 above, were engaged in: (gross erroneous, arbitrary, capricious decision making process, based on misleading information and misrepresentation, falsification of documents and use of false accounts, (b) decision making process which shows bad faith efforts and lack of good business practices, and (d) negligence in the performance of their duties with respect to the statutory and regulatory Conduct of the Procurement functions and activities as outlined in paragraphs 6 though 12 above, resulting in unlawful acts.

> 17(c) Finding, as a direct and approximate result of their actions, prohibited by the 28 U.S.C. § 1343 and related statutes OR unlawful acts, as noted in paragraphs 14(a) through 15(e) and 16(a) through 16(a) above, the economic interest of the Plaintiff has been compromised seriously by the inaction of these defendants, and thus, substantial losses had resulted ...
>
> Proposed Amended Complaint
> pp. 17 - 18.

Thus, plaintiff's position is that the agencies' action is failing to follow required procedures in notifying him within the required time of its response to his unsolicited proposal that the agencies violated his civil rights. However, as noted above, there is no allegation of racial animus. Alleging that the agencies knew he was a member of a racial minority and failed to follow proper administrative procedures does not state a claim under section 1981 because it does not allege that the defendants' actions were racially motivated and purposefully discriminatory. *Waldron v. Rotzler*, 862 F.Supp. 763 (N.D.N.Y. 1994).

The key question in examining the sufficiency of a claim based on § 1981 is whether plaintiff has "assembled specific facts adequate to show or raise a plausible inference that [he was] subjected to race-based discrimination." *Dartmounth Review v. Darthmouth College*, 889 F.2d 13, 17 (1rst Cir. 1989). "Under § 1981, the events of the intentional and pur-

poseful discrimination, as well as the racial animus constituting the motivating factor the defendant's actions must be specifically pleaded in the complaint to withstand dismissal under Rule 12(b)(-6)." *Yusuf v. Vassar College*, 827 F.Supp. 952, 955 (S.D.N.Y. 1993). In order to make a proper pleading under § 1981, plaintiff must allege some facts that demonstrate that his race was the reason for the defendants' actions. *Jafree v . Barber*, 689 F.2d 640, 643 (7th Cir. 1982). Failure to allege such facts makes claim incomplete. *Id.*

Id. at 768-69

Plaintiff also seeks to add a claim under 15 U.S.C. § 637. Amending plaintiff's complaint to add a cause of action under 15 U.S.C. § 637 would <u>not</u> give this court jurisdiction under 28 U.S.C. § 1345 [SIC]. Further, this district court lacks subject matter over plaintiff's claim under this section for damages in an amount over $ 10,000 because the United States Court of Federal Claims has exclusive jurisdiction over such claims. *See Enplanar, Inc. v. Marsh*, 829 F.Supp. 848 (S.D. Miss. 1992) *aff'd* 25 F.3d 1043 (5th Cir. 1994), *cert. denied* 115 S.Ct. 312.

Accordingly, plaintiff's proposed amended complaint failing to state a claim against defendants under 28 U.S.C. § § 1981, 1983 and 1988 and a claim under 15 U.S.C. § 637 in an amount over not conferring jurisdiction on this court; it is therefore

ORDERED that plaintiff's first Motion to Request a [sic] Leave of Court in Order to Amend the Plaintiff's Complaint is **DENIED**. It is further

ORDERED that the denial of plaintiff's first Motion to Amend his complaint to add a claim under 15 U.S.C. § 637 is without prejudice. Pursuant to a separate order of this court plaintiff is granted leave to amend his complaint to clearify that he seeks relief the Tucker Act.

DATED this 9th day of April 1997.

"s/ ALAN B. JOHNSON"

CHIEF UNITED STATES DISTRICT
JUDGE BY DESIGNATION

Case Number: 96-WY-1305-AJ

I certify that I mailed a copy of the attached to the following:

Dated: April 21, 1997

JAMES R. MANSPEAKER, CLERK

André Kimboko
2736 W. 22nd St.
Greeley, CO 80631
cc: Magistrate Judge Pringle

"s/Glenna Drake"
Deputy Clerk

Robert Clark
Assistant United States Attorney

Statutes

A. Equal Rights under the Law

Section 1981 of Title 42 - states in its Subsection (a) - Statement of Equal Rights:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1981a of Title 42 - states in its sub Subsection (a)(1) - Right of recovery,

(1) Civil rights:

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed

in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

Thus, Section 1981 of title 42 is different from Section 1981a of title 42 - they are NOT the same or equivalent. The Honorable CHIEF district court judge, Alan B. Johnson believes that their interchangeable

B. United States as defendant

28 U.S.C. § 1346(b) states:

Subject to the provision of Chapter 171 of this title, the district courts, together with the United States District for the District of the Canal Zone and the District COurt of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

C. Declaration of policy

41 U.S.C. § 401 states:

It is the policy of the United States Government to promote economy, efficiency and effectiveness in the procurement of property and services by the executive branch of the Federal Government by -

...

(4) promoting the participation of small business concerns;

(5) supporting the continuing development of a competent, professional work force;

...

(8) promoting fair dealings and equitable relationships with the private sector;

...

Federal Acquisition Regulations ("FAR")

A. FAR § 15.504 Advance guidance

FAR § 15.504(a) states:

Agencies shall encourage potential offerors to make preliminary contacts with appropriate agency personnel before expending extensive effort on a detailed unsolicited proposal or submitting proprietary data to the Government. These preliminary contacts should include -

(1) Inquiries as to the general need for the type of effort contemple-

ted; and

(2) Contacts with agency technical personnel for the limited purpose of obtaining an understanding of the agency mission and responsibilities relative to the type of effort contemplated.

B. FAR § 15.506-1 Receipt and initial review

FAR § 15.506-1(c) states:

Agencies are not required to perform comprehensive evaluation of unsolicited proposals not related to their missions. If such proposals are received, the agency contact point shall promptly reply to the offeror, state how the agency interprets the proposals, and why it is not being evaluated.

C. FAR § 1.102 Statement of guiding principles for the federal acquisition system ("FAR")

FAR § § 1.102(b)(3) & 1.102(b)(4) state:

(3) Conduct business with integrity, fairness, and openness; and

(4) Fulfill public policy objectives

D. FAR § 1.102-2 Performance standards

FAR § 1.102-2(c) states:

Conduct business with integrity, fair-

ness, and openness

Federal Rules of Evidence

Rule 106 - Remainder of or Related Writings or Recorded Statements:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at the time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Rule 901 - Requirement of Authentication or Identification:

(a) General provision - The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations - By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule: ...

Rule 801 - Definition

(a) Statement - A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as assertion.

(b) Declarant - A "declarant" is a person who makes a statement.

D.C.COLO.L.R. 7.1(F)

A motion filed under Fed.R.Civ.P. 56 shall be accompanied by a concise brief. An opposing brief shall be filed within twenty days after service of the motion or such additional time as the court may set. A reply may be filed only upon leave of court requested promptly after service of the opposing brief.

MICHAEL R. NELSON

19 Nov 94

Dr. Kimbako,

It was good to talk to you today. I hope you find the enclosed information helpful.

Yours,

Michael R Nelson

Department of Health and Human Services
Office of the Secretary
Washington, D.C. 20201

August 9, 1995

MESU ASSOCIATES, INC.
2736 W. 22nd Street
Greeley, CO 80631

Attention: Mr. Andre Kimboko, President

Subject: Unsolicitated Proposal

Dear Mr. Kimboko,

I have been asked to respond to your letter of June 27, 1995. Please be aware that your proposal was never evaluated on the merits. Your proposal was sent to several agency offices who were asked to "evaluate" your proposal in terms of expressing their willingness to sponsor your idea. This is a threshold step that must be satisfied before an evaluation on merits is undertaken.

While unsolicitated proposals are a valuable means for Government agencies to obtain innovative or unique methods or approaches to accomplishing their missions from sources outside the Government your proposal could not be linked to any mission of this agency. Frankly, a better analysis of your proposal should have been undertaken by the contracting officer before she distributed it to the agency offices and you should not have been required to provide additional information.

A more proper venue for your proposal may have been the General Services Administration (GSA). I suggest this because federal agencies lack the authority to purchase the type of service you offer at the dollar level expressed in your proposal absent a specific delegation of authority from GSA. Still, assuming such authority could be obtained and that your proposal could have been linked to an agency mission, HHS would have needed the Congress to appropriate sufficient funds to cover the costs of your proposal as the proposed costs equal a quarter of our total procurement budget. The foregoing notwithstanding, we appreciate your interest in our procurement program, and I am sorry that better information was not provided to you sooner.

Sincerely,

"s/Marc R. Weisman", Director

Division of Acquisition Policy
and Oversight

Department of Health and Human Services
Office of the Secretary
Washington, D.C. 20201

MAR 29, 1996

MESU ASSOCIATES, INC.
2736 W. 22nd Street
Greeley, CO 80631

Subject: FOIA request related to GAO case B-261232.6

Dear Dr. Kimboko,

Please be advised that the General Accounting Office dismissed your protest as frivolous and without merit. therefore, this agency was not required to prepare or submit an agency protest report.

Sincerely,

"s/Marc R. Weisman", Director

Division of Acquisition Policy
and Oversight

OFFICE OF THE VICE PRESIDENT
WASHINGTON, D.C.

January 12, 1995

Andre Kimboko, Ph.D.
Mesu Associates, Inc.
2736 West 22nd Street
Greeley, CO 80631

Dear Dr. Kimboko:

Thank you for writing to the Vice President to express your interest in the establishment of the National Information Infrastructure (NII). On behalf of the Vice President, I am pleased to have this opportunity to respond.

The National Telecommunications and Information Administration (NTIA) at the Department of Commerce would be the government agency best able to address your specific inquiries concerning the NII effort. Your should direct your specific questions to:

NTIA NII Office
U.S. Department of Commerce
15th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Again, thank you for turning to the Vice President with this matter. You can be sure that he appreciates you willingness to participate in this critical program.

Sincerely,

"s/Bill Mason"

Director of Correspondence
for the Vice President

U.S. Department of
Transportation
Office of the Secretary
of Transportation

August 16, 1995

Dr. Andre Kimboko
President

MESU Associates, Inc.
2413 - 27th Street #8
Greeley, CO 80631

Dear Dr. Kimboko:

We have reviewed your unsolicited proposal entitled "Online Internal Information Retrieval System/Network for Federal Executive Branch Unpublished Full-Text Documents (and Bibliographic References for Published Documents." We have concluded that your proposal is not a unique concept as federal agencies already possess the capability to communicate electronically with each other, as well as, the public and private sector via the World Wide Web, the Internet and various Bulletin Boards. Further the disposition of unpublished documents are

left to the discretion of each agency.

Since your concept of developing an on-line information retrieval system is not DOT unique but involves all of the Federal Agencies, your should send your unsolicited proposal to the Office of Management and Budget (OMB). The OMB has been mandated by the Paperwork Reduction Act to ensure that Federal agencies perform and procure their information resources management activities in an efficient, effective and economical manner. To this end, the OMB responsibilities include, but are not limited to, providing overall leadership and coordination for Federal information resources management within the executive branch and reviewing and approving proposals for changes in legislation, regulations, and agency procedure to improve the information resources management.

Furthermore, the Office of the Vice President, Al Gore, is in a better position to provide a Government-wide coordinator and response. Since you have already sent your unsolicited proposal to Vice President Gore, you should follow-up with his office.

Based on the above, your unsolicited proposal enclosures are returned herewith. Thank you for your interest in contracting opportunities at the DOT.

Sincerely,

"s/Richard A. Lieber"

Chief, Procurement Operations Division

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-1305-AJ

ANDRE KIMBOKO

Plaintiff,

v.

United States of America, et al.

Defendants.

MOTION TO REQUEST A LEAVE OF COURT IN ORDER TO REPLY TO THE RESPONSE PROVIDED BY THE DEFENDANTS REGARDING THE PLAIN TIFF'S MOTION TO SEEK FOR A SUMMARY JUDGMENT

COMES NOW the Plaintiff, by and through undersigned André Kimboko, Pro Se, filed a motion for a summary judgment, **MOTION TO SEEK FOR A SUMMARY JUDGMENT**, on August 31, 1996, and the hearing for that motion is set for October 16, 1996 at 1:15 p.m. and Plaintiff has received today, September 24, 1996, a copy of the Defendants' response to that motion; pursuant to D.C.COLO.L.R. 7.1(F) and under Fed.R.-Civ.P. 56(e), Plaintiff is requesting a leave of court to reply to the Defendants' response; in support of this request, the Plaintiff offers the following:

1. Defendants have misrepresented the facts involved in this case, mainly assertions and remarks about "government contracting with MESU", "characterization of the Plaintiff's proposal", "issuing of request for proposal ("RFP") by defendant Federal agencies", and others.

2. More significantly, Defendants' arguments regarding the jurisdiction of this Court over this action, including the definition of the Plaintiff's claims, are erroneous and incompetent.

3. Total disregard, by the defendants, to address both subparagraphs in FAR § 15.506-1(c) requirements, critical legal components and the main substance of this action.

WHEREFORE, Plaintiff requests that this Court allows the Plaintiff to reply to these critical assertions by the Defendants and further requests a leave of court of no more than two days from the day of granting this request, leave of court, to reply.

Dated this 24th day of September, 1996.

Respectfully submitted,

"s/André Kimboko, PhD"

Plaintiff

2736 W. 22nd Street
Greeley, Colorado 80631
(970) 330-1389

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-1305-AJ

ANDRE KIMBOKO

Plaintiff,

v.

United States of America, et al.

Defendants.

REPLY TO THE DEFENDANT AGENCIES' RESPONSE REGARDING THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND DEFENDANT AGENCIES' MOTION TO DISMISS

COMES NOW the Plaintiff, by and through undersigned André Kimboko, Pro Se, pursuant to Minute Order entered by Chief Judge Alan B. Johnson on September 25, 1996, Plaintiff (a) replies to the Defendant agencies' response to the Plaintiff's motion for a summary judgment and Defendant agencies's motion to dismiss, and (b) moves to assert jurisdiction of this court over the Plaintiff's motion before this Court by providing jurisdictional grounds which include, in part, the following: (i) the 28 U.S.C. § 1343 prΩvisions, (ii) Civil Rights Act of 1964 as amended, (iii) 42 U.S.C. § § 1981, 1983 and 1988, (iv) 15 U.S.C. § 637, and ¢E(v◊ther related civil rights statutes, states as follows:

I. REPLY, FACTS

(B). EXTENT OF THE RESPONSE

The Defendant agencies' **ANSWER** or **RESPONSE** to the Plaintiff's motion, summary judgment, is a complete and total recitation, including generous quotes and references, of the GAO's decisions. This exercise by the Defendant agencies, quotes from GAO's decisions, amounts to at least 98% of the defendant agencies' response. 1.85% was devoted to the averment about the SIZE of the Plaintiff's proposal; and 0.15% is a mention about (a) the Federal procurement process, mainly contracting, and (b) the handling of the Plaintiff's proposal by the Defendant agency officials.

All the Defendant agencies, including the Office of the Vice President, have received copies of the relevant protests [see ATTACH A_{09}] filed with the GAO, and received the GAO's decisions.

Plaintiff disagreed with the findings and decisions of the GAO. This was bought to the attention of the GAO, in form of **Request for Reconsideration**, filed with the GAO on November 27, 1995 [see A\TACH A_{09B}], and all of the defendant agencies, **four agencies, NOT si**, and the Office of the Vice President of the United States of America. Dealings with the GAO on GAO's procedural matters were brought to the GAO's attention also during that period [see ATTACH A_{09C}].

The Plaintiff does not claim the 28 U.S.C. § 1342 provisions, as inferred by

the Defendant agencies in their ANSWER, page 8.

All the Defendant agencies and the office of the Vice President of the United States of America admitted having received both the proposal Synopsis [see ATTACH A_{01A}] and the full and detailed proposal which included the proposal's Abstract [see ATTACH A_{01A} through A_{01E}]. The counsel for the Defendant agencies extensively quoted from it in their characterization of the Plaintiff's proposal - proposal size - in their MOTION TO DISMISS.

The proposal's Abstract is a component of the proposal. The first sentence of the first paragraph of both the Abstract and the Synopsis [see ATTACHA $_{01A}$] states that " Plaintiff is an 8(a) certified, the individual, and the concern [MESU] is totally owned by the Plaintiff".

The proposal's Synopsis is a complete description of the anticipated proposal content and supplied by the Offeror or Bidder during the Needs Assessment stage (the earliest stage or phase) of the Conduct of the Procurement, as required by the FAR § 15.5 provisions.

II. REPLY, INSTRUCTIVE FACTS

A. 8(a) STATUS AND CONTRACT AWARD WITHOUT COMPETITION A "SOLE SOURCE" FEDERAL PROCUREMENT

"Sole source" means that only one company or one person or individual is the only entity to be awarded the contract

under consideration, **WITHOUT COMPETITION.**

There are or exist statutory authorities, Acts of Congress, which permit or allow for contract award "without competition". One of these is the 8(a) Program, a fact obliterated by GAO's decision.

The 15 U.S.C. § 637(a), a section in the Small Business Administration statutes, defines the conditions of "sole source" government contract awards, including contracts to be let noncompetitively, program participant qualifications for certification.

This statutory authority is duly specified in **FAR** § 6.302-5 (Authorized or required by statute) which states in part that:

> "(a)(2) Full and open competition need not be provided for when (i) a statute expressly authorizes or requires that the acquisition be made through another or from a specified source or (ii) ..."

and

> "(b) This authority may be used when statutes, such as the following, expressly authorize or requires that acquisition be made from a specified source or through another agency: ..."

and finally

> "(b)(4) Sole source awards under the 8(a) Prooram - 15 U.S.C. § 637"

For the 8(a) Program, subsection or paragraph 15 U.S.C. § 637(a)(8) further specifies the eligibility of the program participants which states that:

> "All determination made pursuant to paragraph (5) with respect to whether a group has been subjected to prejudice or bias shall be made by .... ",

and

Paragraph 15 U.S.C. § 637(a)(5) provides the group definition:

> "Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities ..."

and, paragraph 15 U.S.C. § 637(a)(6)(A) provides the definition for those individuals who are economically disadvantaged as:

> "... those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."

African Americans, based on their race, ethnicity and national origin criteria, belong to one of these groups of individuals.

Plaintiff is an African American. Economically disadvantaged individuals are defined in Paragraph 15 U.S.C. § 637(a)-(6)(A).

The certification is based on the INDIVIDUAL and not the concern owned by the Socially and/or economically disadvantaged individuals, UNLESS, the socially and/or economically disadvantaged INDIVIDUAL owned at least 51% of the concern.

Further "sole source contract award" conditions θre detailed in the U.S.C. § § 637(a)(11), 637(a)(12), 637(a)(14), 637(a)(14), and other provisions.

FAR § 6.302-5(b)(4) is based on an Act (a statute) of Congress. In 1985, Plaintiff was certified an 8(a) Program participant and owner of concern which could be referenced as an 8(a) certified concern. One of the program benefits is or was the availability of the "sole source" contract award opportunities, especially through personal marketing activities, including bid and proposal preparations and submission to appropriate Federal agencies. **THIS OPPORTUNITY WAS DENIED THE PLAINTIFF BY THE GAO'S DECISION**, an act prohibited by the above referenced civil rights statutes and laws.

Except for clerical reviews and adjustments imparted by Dr. Priscilla O. Kimboko, Plaintiff alone had conceived, researched, designed, prepared, written, typed, proofread the entire proposal.

B. ATTACHMENTS

All the attachment A and B are an integral component of this REPLY. Exhibits [ATTACH A ...] should be read in connection with the Attachment A, located at the end of this REPLY. Attachment B provides the proposal chronology.

III. REPLY, SUBSTANCE OF THE CLAIMS

A. GENERALLY

Plaintiff is an African American, a Black individual of the African descent (national origin). And, the provisions of title 24 of the Revised Statutes (Civil Rights) for the protection of all persons in the United States of **THEIR CIVIL RIGHTS** (race, color, ethnicity and national origin, in this case) and **THEIR VINDICATION** in cases of violation of these rights, confer jurisdiction on the United States District Courts for ALL civil rights matters.

Moreover, Plaintiff is a "**socially and economically disadvantaged**" individual, as defined in 15 U.S.C. § 637, **whose civil rights**, as defined in the Civil Rights Act of 1964 as amended, have been violated by UNLAWFUL actions perpetuated by the Defendant agencies, the Comptroller General of the United States of America, General Accounting Office ("GAO"), and the office of the Vice Present of the United States of America via the Proposal Contact Person, Mr. Michael Nelson, Special Assistant to the

President of the United States of America, Office of Science and Technology Policy, The White House, solely because of the Plaintiff's race, color, ethnicity and national origin.

They all have engaged in activities and decision making process during the "Conduct of the Procurement" resulting in actions and decisions, prohibited actions or **UNLAWFUL ACTS** under the 28 U.S.C. § 1343 and other Civil Right statutes, including the Civil Rights Act of 1964 as amended, and 42 U.S.C. § § 1981, 1983 and 1988, and lack of consideration of the 15 U.S.C. § 637 provisions.

As in any complex occurrences, the unlawful decisions and actions by the Defendant agencies, GAO and the Proposal Contact Person, are interrelated in many instances or situations, especially those between the Defendant agencies and the GAO, and the Proposal Contact Person and at least one of the Defendant agencies, mainly the NTIA of DOC, through Mr. Larry Irving and Ms. Tatia Williams, and the Defendant agencies and the Plaintiff.

Nevertheless, they are presented in the following sequence: (i) the GAO, through its decisions, (ii) actions by defendant agency officials, during the "Conduct of the Procurement", and (iii) those by the Proposal Contact Person, Mr. Michael R. Nelson, Assistant to the President of the United States of America.

These prohibited actions or unlawful acts are viewed as unlawful decisions and actions perpetuated by (i) the GAO,

through its decisions, (ii) actions by defendant agency officials during the "Conduct of the Procurement", and (iii) those by the Proposal Contact Person, Mr. Michael R. Nelson, Assistant to the President of the United States of America, under the topics of **PROHIBITED ACTIONS AND DECISIONS**, below.

B. REPLY, DECISIONS BY THE GENERAL ACCOUNTING OFFICE ("GAO") AND PROPOSAL EVALUATION

Several legal and factual points of contention or issues were raised by Plaintiff. See ATTACH $_{A09B}$ [Request for Reconsideration]. One of the issues raised was the statutory authority which allows GAO to obliterate a statute such as 15 U.S.C. § 637, to include the decision about the failure by the Defendant agencies to comply with the FAR § 15.5 provisions as a "technical violation". See ATTACH $_{A09C}$. These issues were NEVER answered by the GAO.

Numerous other inconsistencies and discrepancies, and misrepresentations in the GAO's decision making process were documented facts; contrary actions and accounts of facts have also contributed to its erroneo decisions.

Plaintθff contends that the GAO does not have any legal authority to change any statutory authority. To do so is simply a racially motivated action (decisions), even by the GAO, the guardian of FAR inte{pretation. More significantly, GAO had deprived the Plaintiff of economic and financial (contract) opportuni-

ties by those decisions which are unlawful actions and decisions under the various statutes referenced above.

(A) Averments by the Comptroller General of the United States

Echoing the GAO's decisions, defendant agencies' counsel, generously repeated in their MOTION TO DISMISS that:

(i) "In all four instances here, it appears that each agency reviewed Mesu's [SIC] unsolicited proposal an online information retrieval system, but did not award a contract to Mesu [SIC] ...". Page 3, last paragraph of the Defendant agencies' Motion.

(ii) "... are not required to award contracts on the basis of unsolicited ≡roposals, without competition, ...". Page 3, last paragraph of the Defendant agencies' Motion.

(iii) "The Comptroller General of the United States rejected plaintiff's proposal in its letter of November 9, 1995, ...". Page 3, last paragraph of the Defendant agencies' Motion.

(iv) "... At NO time did ANY defendant invite plaintiff to his proposal, ...". Page 3, first paragraph of the Defendant agencies' Motion.

(v) "..., the regulations dobprovide that agencies must act within a certain time frame, failure to do so here was a **TECHNICAL VIOLATION** which

does not entitle a protester to relief." Page 3, first paragraph of the Defendant agencies' Motion.

(v) "Because plaintiff's bid was unsolicited, he is not even entitled [to] recover bid preparation." Page 8, 4th paragraph of the Defendant agencies' Motion.

THESE AVERMENTS ARE NOT AL ALL SUPPORTED BY THE AVAILABLE FACTS, AS STATED IN VARIOUS CORRESPONDENCE BETWEEN PLAINTIFF AND THE DEFENDANT AGENCIES, AND STATUTES ESTABLISHED REQUIREMENTS, AND FAR § 15.5 PROVISIONS ON THIS SUBJECT. MOREOVER, THEY ARE ALL RACIALLY MOTIVATED.

(i) At least one of the Defendant agencies does not concur with the assertion of

"... each agency reviewed Mesu's [SIC] unsolicited proposal ...".

The HHS's letter of August 9, 1995, under the signature of Mr. Marc R. Weisman, Director, Division of Acquisition Policy and Oversight, reads in part:

" ... Please be aware that your proposal was **NEVER** evaluated ...",

and moreover,

"Frankly, a better analysis of your proposal should have been undertaken before the contracting officer before she distributed it to the agency offices and you should not have been

required to provide ADDITIONAL INFORMATION."

Paragraph 1 of page 1 of ATTACH A_{07}

These two HHS statements simply negate the GAO's averment [quote Nos. (i)]: "In all four instances here, it appears that each agency reviewed Mesu's [SIC] unsolicited proposal an online information retrieval system, but did not award a contract to Mesu [SIC] ...". Page 3, last paragraph of the Defendant agencies' Motion. This GAO's averment is incompetent and immaterial to this case and is purely a racially motivated conjuncture by GAO's protest reviewers. It is a typical racially motivated statement.

(ii) FAR § 6.302-5(b)(4) sets conditions for awarding of contract without competition - the 8(a) Program (a current procurement statute). Counsel's and GAO's statement about "contract award without competition" [quote Nos. (ii)] is incompetent and irrelevant, and shows a lack of understanding of the Federal procurement provisions and statutes. Under the GAO's decisions, this statute will be negated, obliterated, eliminated without any congressional action or an Act of Congress.

(iii) Further, the proposal was NOT submitted to the GAO for funding as averted by the counsel for the defendant agencies [quote Nos. (iii)]. Thus, GAO CANNOT reject it - it does not have statutory authority to do so, anyway. Moreover, the GAO DOES NOT have the authority to review the merit of a proposal

under protest. Analyzing the content (SIZE OF THE PROPOSAL in terms of its total proposed budget) is a characterization unworthy of Federal organizations such as GAO.

(iv) Again, this is [quote Nos. (iv)] another example of lack of understanding of the Federal procurement provisions aed statutes related to the unsolicited proposals. See FAR § 15.5 provisions. Note that at least one of the defendant agencies invited the Plaintiff to provide information about the proposal - "... and you should not have been required to provide ADDITIONAL INFORMATION." Paragraph 1 of page 1 of ATTACH A_{07}. Although,General Services Administration (GSA) has set these requirements, FAR § 515.506-2, at 45 days, and the Department of Commerce ("DOC") establishes it at no more than 60 (sixty) days per Department of Commerce Procurement Reoulations (DOC-PR) Subpart 13-4.9 [See ATTACH A_{09B}]. GSA and USDA, for instance, have fully (both subparagraphs) complied with these FAR § 15.506-1(c) provisions. See ATTACH A_{09E}.

(v) The defendant agencies have failed to **promptly notify the Plaintiff** of their decisions, within the meaning of BOTH subparagraphs of FAR § 15.506-1(c), that is, between 45 (forty five) and 60 (sixty) days. This failure is **NOT** simply a **technical violation [quote Nos. (iv)]. It is a violation of the FAR provisions**, and LATE proposal penalties are defined by FAR § 15.412(d) which are the total forfeiture of the bid or proposal, regardless of the bid or proposal size. Jury will be asked to dotermine the level of

exception to be accorded to the Federal government officials for violating the same. **The GAO has NO statutory authority to do so.**

(vi) "Because plaintiff's bid was unsolicitod, he is not even entitled [to] recover bid preparation." Page 8, 4th paragraph of the Defendant agencies' Motion. At least one defendant agency required Plaintiff to provide the full and detailed proposal. See ATTACH A_{07}. HHS's case, above. All defendant agencies have admitted receiving proposal synopsis, an instrument used to assist the bidders, offerors or proposers [Plaintiff] to avoid incurring unnecessary proposal or bid preparation costs. All defendant agencies ignored it.

Again, the so-called evaluation results were provided to the offeror (André Kimboko, in this instance) ONLY after SEVERAL requests were made regarding the proposal status. See ATTACH A_{03}, A_{04B}, A_{061}. They were received about 740 (seven hundred forty) days after the receipt of the assurance letters for proposal evaluation. The proposal notification responsibilities are set by FAR § 15.1001.

Note that Vice President of the United States of America, Al Gore, has yet to respond to my request for clarification of his letter of August 14 and October 21, 1993 (ATTACH A_{01M}), and those under the signature of Mr. Bill Mason, dated January 12 and August 17, 1995 (ATTACH A_{05}, A_{06} and A_{06}).

As noted in these attachments, several reminders were submitted to the Defendants urging them to fully comply with the entire FAR § 15.506-1(c) requirements. Requests for proposal status reports were made under the Freedom of Information Act (FOIA), **Notice for DEMAND FOR RESPONSE**, and others, between October, 1994 and May, 1996.

(B) Some Critical Consequences of GAO's Decisions

(i) All time-related procurement activities will be invalidated since Contracting Officers (COs) will make up their decisions at whim, under these GAO's decisions. Although, procurement statutes and regulations set, established time limitations and standards for all time-related or sensitive Federal procurement activities, through **41 U. S. C 416(a)(3)(B)** (which sets a time limitation which ranges from 30 to 45 days for offerors (or business concerns) to response to procurement notices through sealed bids, requests for proposals (RFP).

(ii) All penalties for failure by an offeror (or business concern) to comply with these statutory time limitations, for compliance, as defined at FAR § 14.-304-1(a) and § 14.304-3, and "LATE" proposal penalties are specified by FAR § 15.412(d) will be invalidated. Also, proposal notification responsibilities set at FAR § 15.1001 will be nullified.

(C) Other GAO's Inconsistencies

Several other inconsistencies exist in these GAO's decisions. They are detailed in A_{09}, November 27, 1995 Letter for Request for Reconsideration (Request for Reconsideration, GAO).

a) Referral of Cases to United States Court of Federal Claims

Under the 28 U.S.C. § 2510 (Referral of Cases by Comptroller General), the Comptroller General could have (may) transmitted the proposal to the United States Court of Federal Claims. The 28 U.S.C. § 2510 (Referral of Cases by Comptroller Gene≥al) states that:

(a) The Comptroller General [the only Comptroller General of the United States of America, the head of the GAO!)

> "may transmit to the United States Court of Federal Claims for trial and adjudication any élaim or matter which the Court of Federal Claims might take jurisdiction on thevoluntary action of the claimant, together with all vouchers, papers, documents, and proofs pertaining thereto."

> (b) The United States Court of Federal Claims shall proceed with the claims or matters so ≥eferred as in other cases pending in such Court and shall render judgment thereon.

The GAO had, in its position, the protest filed by the Plaintiff. GAO rendered its decisions. The Comptroller General

of the United States of America had the opportunity and certainly the statutory authority or permission (without the Plaintiff consent), under the 28 U.S.C. § 2510 provisions which allows it, to "transmit to the United States Court of Federal Claims" the Plaintiff's protest for trial and adjudication; accordingly, the GAO has the competency and capability (GAO employs one of the largest group of lawyers in the Federal government, especially Federal procurement law), and the possibility to have done so, but, did not.

GAO failed to apply the 28 U.S.C. § 2510 (Referral of Cases by Comptroll/r General). This is the SAME GAO whose decisions form the core, the ONLY defense presented, of the defendant agencies' response and thus, have been extensively and exclusively quoted by the counsel for the defendant agencies. It seems that the GAO's expertise [SIC] in Federal procurement was of NO avail in this case, at that specific time.

Why is it appropriate NOW to move this case to the United States Court of Federal Claims? Why this "second thought" approach? The same "second thought" approach is still in operation even at the level of the counsel for the Defendant agencies [see amended version of the defendant agencies' brief, plaintiff's motion for reply was granted].

The GAO rendered its decisions in November and December of 1995. The Defendant agencies were informed of the GAO's decisions. PLaintiff provided the Defendant

agencies, including the office of the Vice President of the United States of America, notices for DEMAND FOR RESPONSE, and the third and final notices were issued in May 10, 19996. See ATTACH A_{11}.

b) Case Law, Not Considered by GAO
The GAO, in particular, disregarded the cases op ***Data General Corp V. U. S.*** CA FC. 915 F2ed 1544 [59 LW 3622], **status:** 40 U. S. C. 759(c); and ***Claude E. Atkins Enterprises V. U. S.*** CAFC. No. 92-377C. 11/23/1992 [61 LW 2392]. 58 Federal Contract Report 694, **status:** 40 U. S. C. 605(c)(5) because of in its decisions.

Constantly and repeatedly, courts have eliminated, curtailed or prohibited such capricious, arbitrary, excessive use of statutory or regulatory authority by Federal agencies and organizations such the¢$ódefendanagencies and the GAO.

The courts' actions inthis regard are apparent in the cases of ***Data General Corp V. U. S.*** CA FC. 915 F2ed 1544 [59 LW 3622], **status:** 40 U. S. C. 759(c); and ***Claude E. Atkins Enterprises V. U. S.*** CAFC. No. 92-377C. 11/23/1992 [61 LW 2392]. 58 Federal Contract Report 694, **status:** 40 U. S. C. 605(c)(5).

As in the case of ***Data General Corp V. U. S.***, the Comptroller General of GAO exceeded his legal jurisdiction (statutory and regulatory authorities) by:

(a) setting "order of precedence" within FAR § 15.506-1(c) paragraph;

(b) negating a current procurement

statute, the 8(a) Program, mandated by the **FAR** § 6.302-5(b)(4) provisions;

(c) engaging in personal conjuncture practices which resulted in pronouncement of several misrepresentations of facts, mainly (i) letters by Vice President Al Gore and Mr. Bill Mason, and, (ii) agencies' "proposal review" notifications. See ATTACH A_{09} and A_{09B}.

Some answers to this GAO's actions may be found in some of the letters received by the Plaintiff from the defendant agencies, in particular the letter by HHS official and indirectly by the letters from HHS, DOT, DOC/NTIA. They are all discussed below under the "Actions (or Inactions) and Decisions by Federal Officials".

c) Actions or Acts by Defendant Agencies and Officials

Several of the most dubious factual and legal deficiencies, and most contradictory and inconsistent misleading facts involved in the GAO's decisions are represented by the letters of HHS, DOT and DOC officials, specifically with regard to thm decision elements used by GAO - proposal evaluation, awarding of a contract without competition. - See ATTACH A_{103}, A_{104} and A_{105}.

In their responses [ATTACH A_{102}] to my requests, under the FOIA, regarding the agency protest report submitted to GAO in response to my protest (complaint), several agencies have indicated that their were not required by GAO, to produce such

documents, and GAO's rules demand them:

1. HHS, "Please be advised that the General Accounting Office dismissed your protest as frivolous and without merit, therefore, this agency was not required to prepare or submit an agency protest report". Letter of March 29, 199 , under the signature of Mr. Marc R. Weisman, Director, Division of Acquisition Policy and Oversight, HHS. See ATTACH A_{104}.

2. NTIA, "After conducting a search we (DOC/NTIA) have not located any records responsive to your (my) request...". Letter of May 2, 1996, under the signature of Ms. Barbara S. Wellbery, Chief Counsel, NTIA. See ATTACH A_{121}.

3. DOT, "A search of records within OST (Office of the Secretary) has failed to reveal documents that meet the terms of your records". Letter of May 9, 1996, under the signature of Ms. Dorothy A. Chamber, Chief, Freedom of Information Act Division, DOT. See ATTACH A_{105}.

These three letters, from the four defendant agencies, indicato in part that the GAO's decisions were arbitrary, and based on personal GAO employees' conjunctures, with disregard for statutory requirements, are solely racially motivated. In fact, HHS admits NOT even having evaluated the proposal. HHS, DOT, DOC were NOT required to submit agency protest reports, and one (HHS) admits that the GAO had decided that the "protest as frivolous and without merit", although GAO pretended that its decisions were based on the results of agencies'

evaluation of the proposal [SIC].

Finally, but not necessarily the least, is the DOC's letter of May 30, 1996. In his letter dated May 30, 1996, mailed June 3, 1996 and received June 8, 1996, Mr. Larry Irving, Assistant Secretary for Communications and Information, and Administrator for the National Telecommunication Administration ("NTIA"), Department of Commerce, states that:

"Because you have provided no information regarding the substance or grounds for your complaint, we are unable to provide a substantive response to your letter." See ATTACH A_{12}.

How can an agency evaluate a proposal which it NEVER received?

However, collaterally, this is the same agency (NTIA) that Mr. Bill Mason, Director of Correspondence for the Vice President of the United States Court of America, directed me to contact for "my inquiries" in his letter of January 12, 1995 (see ATTACH A_{08}), and the same agency which was contacted in August and September, 1995 -letters of August 25 and September 22, 1995, including a September 22, 1995 FAX message, about the "unsolicited proposal".

The office of Vice President Al Gore was informed of this correspondence in my letter of August 25, 1995. See ATTACH A_{08}. A call from Ms. Tatia Williams, Special Assistant to Mr. Larry Irving, NTIA, was received on September 25, 1995 @ 8:10 a.m. local time (Greeley, CO),

about the proposal and the October 2, 1995 deadline for response. Call from Ms. Tatia Williams again on October 14, 1995 and the protests were submitted to GAO, including specific reference to DOC/NTIA, the office of the Vice President of the United States of America.

On May 20, 1996, Ms. Tatia Williams called me about my request for her agency protest report submitted to GAO. There was NO such report generated she informed me and confirmed the content of May 2, 1996 letter by Ms. Barbara S. Wellbery, Chief Counsel of NTIA. About 18 (eighteen) days latter, I received a letter dated May 30, 1996, under the signature of Mr. Larry Irving, Ms. Tatia Williams' immediate supervisor. The substance of the letter of May 30, 1996 is presented above. See ATTACH A_{12}.

The letter of May 2, 1996 by Ms. Barbara S. Wellbery and the May 20, 1996 call by Ms. Tatia Williams (NO agency protest report was submitted to GAO by NTIA), and Mr. Larry Irving letter of May 30, 1996 (NO information regarding the substance or grounds for your complaint) and the GAO's decisions constitute misrepresentation of facts solely based on the race, color and ethnicity of the Plaintiff

d) Actions or Acts by the Proposal Contact Person

Declaration of Michael R. Nelson, attached to the Defendant agencies' Initial Rule 26 Disclosure, filed with

this court on October 2, 1996 and a Certificate of Mailing dated October 1st, 1996, and received by Plaintiff October 3, 1996. Mr. Michael R. Nelson is one of the many Special Assistant to the President of the United States of America, Office of Science and Technology Policy, The White House. His Declaration was NOT signed and was NOT dated. See ATTACH A_{14}.

In his declaration, Mr. Nelson alleges that:

(a) he had at least two telephone conversations with the Plaintiff, "in mid-November, 1993"; no dates are offered!

(b) "in explicit terms that the project proposed would not be funded for the stated above ...",

(c) "I also mailed to Dr. Kimboko [the Plaintiff] a report from the Natioeal Performance Review describing the Administration' efforts to use information technology to 'reinvent' government",

(c) "I did not confirm through written correspondence the information conveyed tΩ Dr. Kimboko in these 2 telephone conversations, however, I did make it unmistakably clear to Dr. Kimboko that his unsolicited proposal would not be funded."

(d) "Dr. Kimboko was very disappointed and upset that his proposßl would not be funded."

FACTS:

(a) Mr. Nelson did write a letter after that conversation: an handwritten letter, dated November 19, 1994, EXACTLY 365 days before HE HAD WRITTEN IT, and mailed in envelope stamped by the United States postal service (USPS) EXACTLY 365 days before the USPS HAD MAILED IT to the Plaintiff.

Copy of his hßndwritten letter is the ATTACH A_{04}.

(b) According to Mr. Nelson's handwritten letter, dated November 19, 1994, Mr. Nelson mailed Plaintiff "infomation" which comprised of A Report from the National Performance Review and four (instead of one) other documents. They were:

i) "Government Information Technology Services (GITS) - Working Group Action Plan" [September, 1994]

ii) "Government Information Technology Services (GITS) Working Group" [September, 1994]

iii) "National Information Infrastructure, Progress Report" [September 13, 1994]

iv) "Creating a Government That Works Better & Costs Less" [September 1993]

THREE OF THE FOUR DOCUMENTS WERE PRINTED SOMETIME IN 1994, NOT 1993, that is, over 365 days before they were even printed!

ALSO USPS STAMPED ENVELOPE DATE IS NOV 21, 1994, WASHINGTON, DC; NOT 1993; ALSO NOTE THE POSTAGE COST $2.90 FOR JUST ONE BROCHURE OF 92 PAGES

Copies of these documents are in ATTACH A_{132}.

(c) Plaintiff also received, enclosed in the same envelope with the above referenced documents, a handwritten letter by Mr. Nelson, dated November 19, 1994 (19 Nov 94) - NOT mid-November, 1993, as claimed by Mr. Nelson!

Copy of the envelope is the ATTACH A_{131}.

PLEASE NOTE THE ADDRESS

(Plaintiff moved to the address, marked on the envelope, June of 1994, as brought to the attention of the White House) - See ATTACH A_{045}.

NO change of address was noted by the USPS as in correspondence noted in ATTACH A_{131}. However, Mr. Nelson was informed of the Plaintiff's change of address and telephone number. See ATTACH A_{03}.

On November 25, 1994, I received another call, the second anm final, from Mr. Michael Nelson. During that telephone conversation:

i) In strongest possible terms, Mr. Nelson became abusive and employed expressions, to characterize the Plaintiff, that need not be repeated here

ii) Mr. Nelson forbiddingly told me NEVER to call again the office of Vice President Al Gore for any reason Mr. Nelson did not explain or say anything - NOTHING - about the proposal status.

Plaintiff complained about the November 19 and 25, 1994 telephone conversations with Mr. Nelson to Vice President Al Gore in letters of November 20, 23 and 25, 1994 and in a November 20, 1994 FAX message. The significance of sending Plaintiff these documents was discussed in one of these letters. See ATTACH A_{04B}.

Shortly after these two telephone conversation incidence with Mr. Nelson, Plaintiff received letter from Mr. Bill Mason, Director of Correspondence for the Vice President, dated January 12, 1995, directly addressing the many requests for proposalstatus reports. See ATTACH A_{05}. In his letter (January 12, 1995), Mr. Mason directed the Plaintiff to obtain answers about the proposal from the NTIA ("National Telecommunication and Information Administration", Department of Commerce). This is different from the assertion of Mr. Nelson (item No. "a", above).

The NTIA was contacted by the Plaintiff many times WITHOUT RESPONSE. See ATTACH A_{08}.

If required, Plaintiff will seek to obtain from Mr. Michael Nelson all the long distance telephone call records for those four specific dates: (i) November 19 and 25, 1994, and (ii) November 19 and 25, 1993.

These telephone conversation assertions by Mr. Nelson constitute the most racially virulent and malicious misrepresentations involved in this case, besides the ones perpetuated by VA and DOC/NTIA officials, and GAO.

Plaintiff will pursue these matters, as attributed to Mr. Michael Nelson, in appropriate court action, including the fact that his declaration was **NOT** signed or dated, and yet attached to the document filed with this Court, the Defendant agencies' DEFENDANTS' INITIAL RULE 26 DISCLOSURE, dated October 2, 1996, mailed the 1st day of October, 1996 and received by Plaintiff October 3, 1996. See ATTACH A_{14}.

ALL defendant agencies, including the office of the Vice President of the United States of America, have recognized their failure to comply with all the requirements of **FAR § 15.506-1(c)**. **ALL** defendant agencies' responses were received about 740 (seven hundred forty) days, instead of 45 to 60 days, after the receipt of assurance letters regarding proposal evaluation, and ONLY after several requests were issued to the defendant agencies and the office of the Vice President of the United States of Americi demanding proposal status reports. See ATTACH A_{05}, A_{06}, A_{061}, A_{07}, and A_{08}.

WHEREFORE, Plaintiff prays this Court will determinate the Plaintiff's motion for a Summary Judgment within the context of (i) the 28 U.S.C. § 1343 provisions, (ii) Civil Rights Act of 1964 as amended, (iii) 42 U.S.C. § § 1981, 1983 and 1988,

(iv) 15 U.S.C. § 637, and (v) other related civil rights statutes:

a) the failure by defendant agencies to fully and completely comply with ALL the provisions of FAR § 15.506-1(c), both subparagraphs in FAR § 15.506-1(c) requirements, was racially motivated and the GAO's decisions are also the results of the personal racial biased of the protest reviewers.

b) the case law cited by the Defendant agencies, as related to both the unsolicited proposals under the GAO's protest review and jurisdictional grounds, is immaterial and irrelevant to the case before this Court.

c) the United States District Court for the District of Colorado has the jurisdictional authority to hear this case, and it is the appropriate Federal court for this action, and the entire complaint.

Dated this 11th day of October, 1996.

Respectfully submitted,

"s/André Kimboko, PhD"
Plaintiff

2736 W. 22nd Street; Greeley, Colorado 80631; (970) 330-1389

MESU
ASSOCIATES, INC.

2132 18TH AVENUE COURT, GREELEY,
CO 80631. TEL. (303) 395-0639

U N S O L I C I T E D

P R O P O S A L

ONLINE INTERNAL INFORMATION RETRIEVAL SYSTEM/NETWORK FOR FEDERAL EXECUTIVE BRANCH UNPUBLISHED FULL-TEXT DOCUMENTS (AND BIBLIOGRAPHIC REFERENCES FOR PUBLISHED DOCUMENTS) or OIFUD

A B S T R A C T

SUBMITTED TO THE OFFICE OF
THE VICE PRESIDENT
Old Executive Office Building
Washington, DC 20560

Attn.: Vice President AL GORE

FROM

MESU Associates, Inc.
Dr. Andre Kimboko, President

THE INFORMATION CONTAINED IN THIS DOCUMENT IS RESTRICTED. PRIOR PERMISSION IS REQUIRED FROM THE AUTHOR AND MESU ASSOCIATES, INC. FOR ANY USE OR DISTRIBUTION OUTSIDE THIS AGENCY.

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Conceived, prepared and written

by

Dr. Andre Kimboko

May 1993

A B S T R A C T

MESU Associates, an 8(a) firm, proposes to submit an **Unsolicited Proposal** to develop an Online *Internal* Information Retrieval System of Federal Unpublished Documents generated by the Executive Departments, and Independent Establishments and Government Corporations (Agencies), including the **National laboratories**.

This system will encompass the full-text of both classified and unclassified unpublished documents. It will also include bibliographic references of published documents presently stored in federal libraries associated with the executive departments, and independent establishments and Government corporations, with the exception of the National Agricultural Library and the National Library of Medicine.

Moreover, it may include "**working papers**" related to policy decisions, systems procurement/acquisitions, or redefinition of current major research emphases or areas.

The system will be referred to as the **Online Federal Executive Internal Information Retrieval System** of *Unpublished Full-Text Documents and Bibliographic References for Published Documents* or **OIFUD**. Thus, the OIFUD is a published documents and unpublished full-text, **desktop publishing format**, documents database in a network communications configuration.

Although the OIFUD is intended to be used mainly by the E'ecutive Office of the President, Secretaries of executive departments and Heads of Independent Establishments and Government Corporations, **it is suggested that the system be made available, with strict security clearance safeguards, to the general public and to institutions of learning.**

As a **management** tool, the OIFUD will enable the Executive Office of the President, and Secretaries of the Executive Departments and Heads of Independent Establishments and Government Corporations, including the **National laboratories**, to directly review departmental and agency programs and project progress and outcomes against their basic missions and program goals and objectives.

The OIFUD would also allow them to monitor the efficiency and effectiveness of their respective programs and projects, and the performance of department and agency functions and activities under their respective management and control.

This will be accomplished through a proposed Simulation Model (SOIFUD) of which

the OIFUD is one of the major components. The SOIFUD will approximate the federal executive branch agencies' missions and mandated programs (functions and activities), and will assist in the review and evaluation of agencies' functions and activities *changes* as necessitated by policy changes, thus, assisting the policy making process, be it through Congress, Presidential executive orders or general public requests.

Although the SOIFUD is about the federal executive branch as a single entity, each agency, and independent establishment and Government corporation will be independently included in SOIFUD as a "submodel" and can be evaluated independently of the other agencies, interacting only to portray an overview of the federal government functions and activities, and their respective effects on the overall Government.

The SOIFUD will not be made available to the general public, (a suggestion!), but its products could. However, SOIFUD represents an excellent learning tool, especially for those graduate students wanting to further their knowledge in the area of quantitative analysis, simulation and modelling, social policy, Government functioning, econometrics, economics, statistics, mathematics to include advanced calculus (differential and difference equations, and others).

The OIFUD can also serve as a tool for educating students, from grade school to higher education, about the basic functions and activities of the federal gove-

rnment, and the rudiments and basics of high tech information communications systems, information science, computer science and technology, and computer-aided problem solving skills.

The project proposed by MESU Associates (MESU) is innovative and unique in its concept and scope. However, it Σoes not pretend to invent a new scanning/imaging technology, computer technology or library science. Rather, the OIFUD will involve the development of appropriate commueications protocols.

These communications protocols will facilitate interagency communication among the numerous federal agency computer systems which presently cannot communicate with each other, as well as intra-agency communication between computer systems within the same agency, i.e. HHS (FDA, PHS,Health Care Finance Administration, SSA, Office of Human Development Services), DOD (DOD component computer systems), to reference a few.

They will also provide standards, formats and forms for the processing of documents as not to repeat past experience which led to the current federal computer system incompatibilities. For instance, DOD components and their respective commands, and HHS, DOI, DOEand other agencies formulate their own standards which are, as we know, in many cases incompatible with each other.

The proposed endeavor is viewed as an infrastructure investment to improve the efficiency of Federal government opera-

tions, and to provide increased government access by the general public, to make the government directly interactive, and assist student and pupil learning process.

To facilitate the introduction of the OIFUD to the general public and its use as teaching aid, MESU is proposing, as part of this unsolicited proposal, a "project demonstration" which will start within three years after contract award, and will run for about two years or three years.

It will involve about six states and twenty schools, grade through high school, and twenty six colleges and universities.

MESU is also suggesting, in connection with this project, the use of some surplus computer systems, left over from military base closures. Such computer systems could be used for the proposed "project demonstration" with respect to the educational aspect of the OIFUD, and the general public access to OIFUD through a mainframe computer systems for information distribution - Host Computer Systems. MESU will work with private PC manufacturing companies to seek contributions.
Moreover, MESU suggests the use of two to three closed or about to be closed military bases for storing government documents, this will save the federal government millions of dollars for storage rental fees and allow for establishing a *uniform* (for the whole federal government) *automated computerized stock locat-*

or system or UACSLS.

Currently Agencies spend a considerable portion of their annual appropriation funds (contracted warehousing personnel and space rental fees estimated in $ millions) to provide printed materials to the general public, using printed forms at less than "real time" mode and at the agencies' discretion as to the contents and subject areas, moreover to only selected segments of the population: NASA, DTIC and NTIC for scientists, contractors, potential grantees; National libraries for medical doctors or farmers; NSF serves mainly engineering, "pure" sciences colleges and universities.

These two suggestions may require congressional action. In anticipation of this possibility, MESU is sending copies of the "Project Summary" only, to the Speaker of the House Thomas Foley, Representatives Ronald V. Dellums and Patricia Schroeder, and Senators Ben Nighthorse Campbell and George Mitchell.

MESU has contacted several executive departments and independent establishments and Government corporations, but could not reach all of them and submit copies of the unsolicited proposal; its size, over three hundred pages, makes it uneconomical to send copies to all concerned agencies, and independent establishments and Government corporations.
To this end, MESU is seeking an OVERSIGHT/CONTACT person at the Executive Office level to facilitate the management of the proposed project, and *centralized funding support is being requested as*

well. When this centralized funding is granted, MESU would seek to credit any agency or DoD command that had previously contracted for these services with MESU.

HHS, DOC (National Telecommunications and Information Administration) or DOD could serve as the project *lead* agency or centralized project oversight agency for the entire project during the OIFUD and SOIFUD development. But the General Services Administration should assume the management of the on-going functions and activities of the OIFUD after its completion, and the proposed Warehouse facilities, closed military bases, for storing federal documents for those agencies presently renting storage spaces, practically all of them, except most DOD components.

The SOIFUD could be administered by an appropriate unit within each agency for its component, and the overall administration of the whole SOIFUD should be entrusted to that part of the Government which is deemed most responsive to the management of the Government operations for the overall monitoring of Government operations, including policy evaluation, program implementation and administration, agency mission review process.

Copies of the **PROJECT SUMMARY** have been sent to the President, Assistants to the President for the Office of Science and Technology Policy (Dr. John Gibbons), Council of Economic Advisers (Dr. Laura D'Andrea Tyson) and Economic Policy (Mr.

Robert E. Rubin).

Copies of the full and complet[illegible]nsolicited proposal are being sent to the Secretaries of HHS, DOD, USDA, DOT, DOI, VA, DOL, DOC, Department of the Treasury for their review and evaluation, and comments. It is suggested that they send their comments to your office, although MESU would like to receive copies of their comments.

The proposed project costs will range from as little as $ 60 million to as much as $ 462 millions or more. The project cost will be in the range of $5 billion, if deemed necessary to achieve the estimated project level of effort of between 660,000 and 750,000 new full-time jobs. This level of effort may be needed to process between four (4) and six (6) billion published and unpublished documents over a five year period or longer and the development of the associated SOIFUD. Except for personnel costs, office space and travel costs, some of the other project costs are only initial costs - "start up" costs.

When extended benefits are accounted for, the net saving of between $103 to $136 billion or more, will be realized every ¢Eyeasta{ting around the third year of the project. It is assumed that by that time most of the proposed project results will be implemented.

The extended benefits include: (1) increased productivity and accountability,

and increased procurement management efficiency (which alone costs the Government nearly $130 billion a year), (2) reduced response time, e.g. users of the Patent and Trademark Office, a m st cumbersome system to use, would be able to access information from a more user "friendly" system, (3) reduced search activity time or resource utilization, increased agency communications, interagency and intra-agency, (4) eliminated rental fees for document storage, (5) enhanced educational resources, (6) general public participation, and (7) improved policy decision making process through the use of an objective pricing mechanism, SOIFUD, a more efficient pricing mechanism.

The above project cost estimates do not include the cost for the Host Computer Systems (mainframe computer or a series minicomputer systems) which will support the permanent online database retrieval system, including terminals for patron-usage.

The Unsolicited Proposal comprises four parts: (1) **Project Summary**, (2) **Transition Period Management Plan**, (3) **Project Management Plan**, and (4) **Business Management Plan**.

MESU is prepared to impart any changes deemed necessary to enhance the project results and to effectuate the project.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-1305-AJ

ANDRE KIMBOKO

Plaintiff,

v.

United States of America, et al.

Defendants.

MOTION TO REQUEST A LEAVE OF COURT TO AMEND PLAINTIFF'S PLEADING AND TO REQUEST TRANSFER OF CERTAIN PORTIONS OF THE CLAIMS FOR RELIEF TO THE UNITED STATES COURT OF FEDERAL CLAIMS

COMES NOW the Plaintiff, by and through undersigned André Kimboko, Pro Se, moves to amend his pleading and to request a transfer (or referral) of those portions of his complaint characterized by this Court and the defendant agencies "as solely based on monetary relief under the Tucker Act". In support whereof, the Plaintiff states and avers as follows:

1. Plaintiff filed a complaint with this court, Civil Action No. 96-WY-1305-AJ, on June 4, 1996. On August 31, 1996 Plaintiff filed a motion for a summary judgment.

2. On October 3, 1996, Plaintiff received from the Defendant agencies their Initial Rule 26 Disclosure which included the Declaration attributed to Mr. Michael Nelson, and also received additional letters from HHS and DOC after the filing of the Complaint.

3. Motion to dismiss filed by the Defendant agencies was granted by this Court on October 16, 1996 under the Tucker Act **ONLY**.

4. One of the several issues to be dealt with in this case is the averments by the persons and their accounts as reported in the Defendant agencies' Initial Rule 26 Disclosure. These issues are integral components addressed in the original pleading - the actions by the Defendant agencies, including the Proposal Contact Person, Mr. Nelson.

5. On October 11, 1996, Plaintiff submitted an Amended Complaint and a Reply to the Defendant agencies' motion to dismiss, including Attachments A and B. It appears that this Court did NOT even review these documents, especially the Plaintiff's reply to Mr. Nelson' declaration. This Court quoted facts from Mr. Nelson's declaration which were never verified as to their accuracy and admissibility. And this was done by this Court at the very end of the hearing with NO connection at all with the so called Tucker Act.

6. Plaintiff must be allowed to challenge these averments in the United States District court environment.

7. The United States Court of Federal Claims does NOT have jurisdiction over Civil Rights Act matters.

WHEREFORE, Plaintiff requests that this Court allows the Plaintiff to amend his plead under the Fed.R.Civ.P. 15(b) and specially Fed.R.Civ.P. 15 (c)(2) and Fed.R.Civ.P. 15(d) in light of this Court's judgment based strictly on Tucker Act and reference to incompetent declaration by defendant agency officials, and to effect transfer of those portions of the Plaintiff's pleadings which are under the jurisdiction of the United States Court of Federal Claims, pursuant to 28 U.S.C. § 1631.

Dated this 18th day of October, 1996.

Respectfully submitted,

"s/André Kimboko, PhD"

Plaintiff

2736 W. 22nd Street
Greeley, Colorado 80631
(970) 330-1389

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-1305-AJ

ANDRE KIMBOKO

Plaintiff,

v.

United States of America, et al.

Defendants.

MOTION TO CURE JURISDICTIONAL GROUNDS AS THEY RELATE TO THE RELIEF AND CLAIMS TO BE SOUGHT UNDER THE UNITED STATES COURT OF FEDERAL CLAIMS

COMES NOW the Plaintiff, by and through undersigned André Kimboko, Pro Se, pursuant to 28 U.S.C. § 1631 moves to request a transfer (or referral) of those portions of his complaint characterized by this Court and the defendant agencies as solely based on monetary relief under the Tucker Act. In support whereof, the Plaintiff states and avers as follows:

FACTS

1. Plaintiff filed a complaint with this court, Civil Action No. 96-WY-1305-AJ, on June 4, 1996. On August 31, 1996 Plaintiff filed a motion for a summary

judgment.

2. On October 11, 1996, Plaintiff submitted an AMENDED Complaint and a REPLY to the Defendant agencies' motion to dismiss, including Attachments A and B.

3. Motion to dismiss filed by the Defendant agencies was granted by this Court on October 16, 1996, under the Tucker Act ONLY.

PLEADING

Pursuant to 28 U.S.C. § 1631 provisions and under the RCFC 84(a), Plaintiff requests a transfer of those portions of the Complaint, including the Amended version and the Reply, which fall under the jurisdiction of the United States Court of Federal Claims, as determined by this Court in its judgment of October 16, 1996, be transferred to the United States Court of Federal Claims.

WHEREFORE, Plaintiff requests that, in the interest of JUSTICE [28 U.S.C. § 1631], those portions of the Complaint, including the Amended version and the Reply, which fall under the jurisdiction of the United States Court of Federal Claims, as determined by this Court, be transferred to the United States Court of Federal Claims, pursuant to 28 U.S.C. § 1631.

Dated this 18th day of October, 1996.

Respectfully submitted,

"s/André Kimboko, PhD"

Plaintiff

2736 W. 22nd Street
Greeley, Colorado 80631
(970) 330-1389

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WY-1305-AJ

ANDRE KIMBOKO

Plaintiff,

v.

United States of America, et al.

Defendants.

MOTION TO AMEND PLAINTIFF'S PLEADINGS TO RELATE BACK AS TO CONFORM TO EVIDENCE, AND OR TO SUPPLEMENT PLEADINGS

COMES NOW the Plaintiff, by and through undersigned André Kimboko, Pro Se, moves to amend his pleadings, pursuant to Fed.R.Civ.P. 15(b) and specially Fed.R.-Civ.P. 15 (c)(2) and Fed.R.Civ.P. 15(d), and under the 28 U.S.C. § 1653 provisions. In support whereof, the Plaintiff states and avers as follows:

FACTS

1. Plaintiff filed a complaint with this court, Civil Action No. 96-WY-1305-AJ, on June 4, 1996. On August 31, 1996 Plaintiff filed a motion for a summary judgment.

2. Plaintiff received from the Defendant agencies their Initial Rule 26 Disclosure which included the Declaration attributed to Mr. Michael Nelson, and also received additional letters from HHS and DOC after the filing of the Complaint.

3. On October 11, 1996, Plaintiff submitted an Amended Complaint and a Reply to the Defendant agencies' motion to dismiss, including Attachments A and B.

4. Motion to dismiss filed by the Defendant agencies was granted by this Court on October 16, 1996, under the Tucker Act ONLY.

5. The focus of the October 16, 1996 Hearing was on Tucker Act; however, at the very end of the hearing, this Court quoted from Mr. Nelson's declaration, as part of the court's judgment.

PLEADING

6. The facts quoted by this Court from Mr. Nelson's declaration were never verified as to their accuracy and admissibility, and the Plaintiff's Reply was available to this Court. It appeared to the Plaintiff that the record (judgment) would show that the facts quoted are true, although, this is NOT the case, as demonstrated in the Plaintiff's Reply.

7. The implications of mntering these quotes into the records are that these quotes are derived from competent sources

which is incorrect. This is NOT a very competent means of dealing with one of the significant components or issues of the Plaintiff's Complaint.

8. The issues, the actions by the Defendant agencies, including the Proposal Contact Person, Mr. Nelson, are integral components addressed in the Complaint. Plaintiff must be allowed [and he has the rights and the obligation] to challenge these averments in this Court, specifically the content of the Declaration attributed to Mr. Michael Nelson, regardless of the judgment [Fed.R.Civ.P.15(b)]. The evidence available to the Plaintiff and included in the Reply show that the declaration, attributed to Mr. Michael Nelson, is one of the most virulent misrepresentations.

9. The relative effects and legal implications of the accounts of these Defendant agency officials, as reported in the Defendant agencies' Initial Rule 26 Disclosure, **MUST** be reviewed, IF this court is to quote from these averments, regardless of this Court's judgment.

10. Plaintiff requests that this motion be reviewed along with the Plaintiff's Reply and Amended Complaint, with all the appended attachments A and B. If granted this motion, Plaintiff will invoke the full application of the **28 U.S.C. § § 1731 and 1746 provisions**, and seek to obtain, through this Court, certified and verifiable records of long distance telephone calls made to the Plaintiff by Mr. Nelson during the period in question. This is to specifically differentiate and

authenticate those quotes made by this Court from the declaration attributed to Mr. Nelson, the Proposal Contact Person, and other similar averments from other defendant agency officials.

11. The "Declaration" attributed to Mr. Michael Nelson and other averments by the Defendant agency officials are fully discussed in the Plaintiff's REPLY and relevant exhibits, Attachment A. Apparently, this Court did NOT even review them prior to the hearing.

WHEREFORE, Plaintiff prays that this Court would: (a) allow the review of these Defendant agency official actions, especially the declaration attributed to Mr. Nelson and quoted by this Court through the amendments of the Plaintiff's pleadings to relate back as to conform to evidence, and/or to supplement pleadings, (b) accept the amended version of the Complaint and the Reply as the basis for the Amended pleadings for a hearing to review these averments by the defendant agency officials, recognizing the fact that the United States Court of Federal Claims lacks jurisdiction in these matters.

Dated this 18th day of October, 1996.

Respectfully submitted,

"s/André Kimboko, PhD"

Plaintiff

2736 W. 22nd Street

Greeley, Colorado 80631
(970) 330-1389

CERTIFICATION OF MAILING

The undersigned hereby certifies that on October 18, 1996, he mailed a true and corrected copy and hand delivered a true and corrected copy of the foregoing Plaintiff's (a) **MOTION TO REQUEST A LEAVE OF COURT TO AMEND PLAINTIFF'S PLEADING AND TO REQUEST TRANSFER OF CERTAIN PORTIONS OF THE CLAIMS FOR RELIEF TO THE UNITED STATES COURT OF FEDERAL CLAIMS**, (b) **MOTION TO CURE JURISDICTIONAL GROUNDS AS THEY RELATE TO THE RELIEF AND CLAIMS TO BE SOUGHT UNDER THE UNITED STATES COURT OF FEDERAL CLAIMS**, and (c) **MOTION TO AMEND PLAINTIFF'S PLEADINGS TO RELATE BACK AS TO CONFORM TO EVIDENCE, AND OR TO SUPPLEMENT PLEADINGS**, by depositing same in the United States of America Postal Service, postage prepaid and addressed to the United States Court of Federal Claims and hand delivering same to the office of Mr. Robert D. Clark, Assistant United States Attorney, District of Colorado, 1961 Stout Street, Suite 1100, Denver, CO 80294-3608

"s/André Kimboko, PhD"